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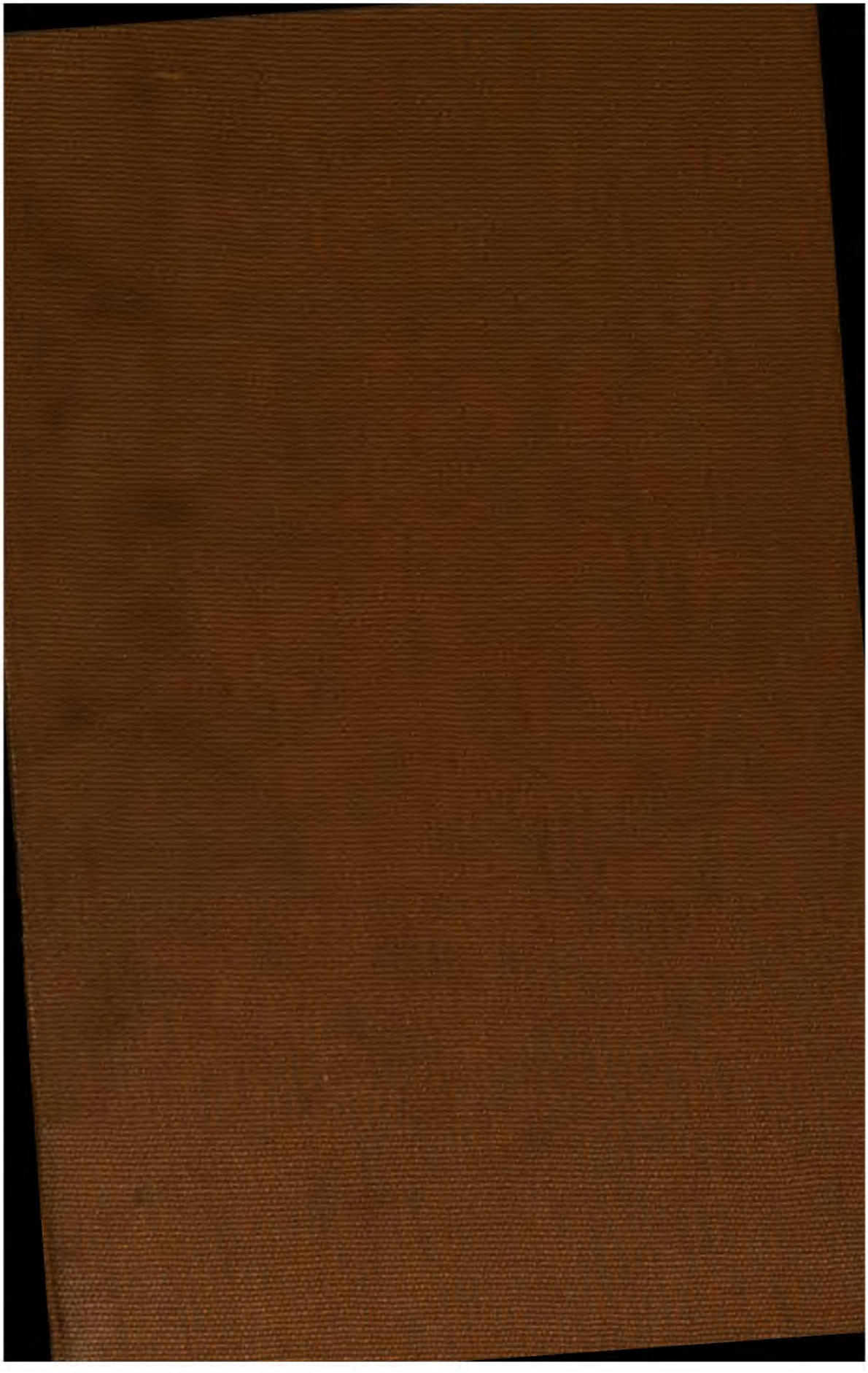

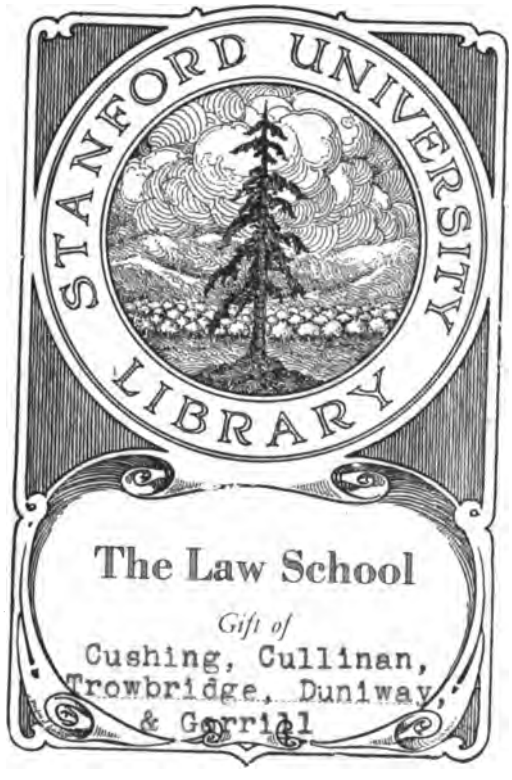
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MONOPOLY

AND

TRADE RESTRAINT CASES

INCLUDING

CONSPIRACY, INJUNCTION, QUO WARRANTO,
PLEADING AND PRACTICE AND EVIDENCE

BY

JOHN LEWSON

OF THE CHICAGO BAR

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VOLUME II

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ANALYZED CASES.

MONOPOLY AND TRADE RESTRAINT CASES.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE CO. v. JUTTE.

(210 Pa. 288, 59 Atl. 1088; 210 Pa. 310, 59 Atl. 1119, 1904.)

Vendor's Covenant; Public Policy; Contracts.

Several individuals undertook, in 1898, the promotion of the Monongahela River Consolidated Coal & Coke Company, a Pennsylvania corporation. For this purpose options were secured by one of these individuals, J. B. Finley, from a large number of persons, copartnerships and corporations, some engaged in business of mining and others in shipping coal from Monongahela River. These options were uniform and contained a stipulation that the bill of sale, if made, should embrace a stipulation that the vendor would not directly or indirectly engage in mining, marketing or shipping coal on the Mississippi, Ohio and Monongahela Rivers, or their tributaries, for a period of ten years, except in conjunction with vendee or his assigns. One of these options was given to J. B. Finley by W. C. Jutte as a member of several firms engaged in coal business. In September, 1899, these options, together with others, were assigned by Finley to and accepted by the Monongahela River Consolidated Coal & Coke Company. In the same month W. C. Jutte's companies made a transfer of all of their property, assets and good will to the Monongahela River Consolidated Coal & Coke Company in consideration of over $1,000,000, and, as part of the same

transaction, these firms and each of their members severally and jointly stipulated with the vendee not to engage, directly or indirectly, individually or through partnership or partnerships, limited partnerships, corporations, except in conjunction with the vendee, in the business of mining, marketing, or shipping of coal in the territory traversed by the Monongahela, Ohio and Mississippi Rivers and their tributaries, for the period of ten years. At about the same time the foregoing transfer was made by W. C. Jutte and his companies to the Monongahela River Consolidated Coal & Coke Company it purchased nearly all the mines then open on the Monongahela River and acquired all the coal-containing vessels and towboats then engaged in the business. It also acquired nearly all the coal landings about Pittsburg, taking from all the persons who sold mines or boats, or both, stipulations similar to that which it took from Jutte in regard to his future engagement in the coal business on the rivers. Disregarding his covenant W. C. Jutte caused the formation of a company under the laws of New Jersey for the purpose of competing with the Monongahela River Consolidated Coal & Coke Company in the territory covered by said stipulation; whereupon the Monongahela River Consolidated Coal & Coke Company brought a bill in equity for an injunction to restrain Jutte from carrying on the business of mining and shipping coal contrary to his agreement. In affirming a decree granting the relief prayed, it was held that:

(1) A covenant made by a seller of a business not to engage in the same business within a limited territory during a specified number of years, if reasonable in so far as it protects the purchaser's interest, is not in restraint of trade, and is enforcible;

(2) A contract in restraint of trade which is limited as to time and space, and is reasonable in its nature, is not void as against public policy of Pennsylvania;

(3) Each state declares and enforces its own public policy

in so far as it affects matters within its territorial jurisdiction and does not conflict with the United States constitution or statutes;

(4) The public policy of Pennsylvania is to encourage and promote large aggregations of corporate capital for the development of all the commonwealth's resources;

(5) Although a contract might be in direct restraint of interstate commerce so as to come within the Sherman Act, yet the contract may be valid when it affects state property or territory only, is limited as to time and space, is not unreasonable in its nature, and is therefore not against state public policy;

(6) "The United States enforces no public policy as a state policy, except so far as is established by the United States constitution and the laws made in pursuance thereof;"

(7) The consideration of a contract which is in restraint of trade as to a portion of the territory in which it operates and is not in restraint of trade as to the other portion is divisible, and the contract will be enforced as to such territory in which it is not in restraint of trade;

(8) Where an illegal consideration for a contract is not divisible, the entire contract falls;

(9) When the consideration of an apparently illegal contract is divisible, one portion of the consideration being valid and the other invalid, a stipulaton founded on the valid portion of such consideration will be enforced by disregarding the invalid portion of such contract; and

(10) Where a part of a contract may be declared legal and another portion illegal, to sustain the legal portion of such contract the reason for the severance must appear in the agreement itself, so that a court construing such contract should not be called upon to make a new contract for the parties. But this does not mean that the severability of the illegal portion of such a contract must appear on *its face.*

NOTE.

On plaintiff's appeal (59 Atl. 1119) from the part of the decree refusing an injunction to restrain defendant from violating his covenant covering territory outside of Pennsylvania, the decree of the lower court was also affirmed on the opinion rendered upon defendant's appeal.

MONTAGUE & CO. v. LOWRY et al.

(193 U. S. 38, 46 L. ed. 608, Cal. 1904.)

Interstate Commerce; Combinations; Attorney's Fees.

The Tile, Mantel & Grate Association of California was unincorporated and consisted of San Francisco and vicinity wholesale dealers in tiles, mantels and grates and of manufacturers of same residing and operating in other states, there being no such manufacturers within the state of California. The association's apparent objects were "to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity (within a radius of two hundred miles) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members." None was permitted to become a member unless he had an established business and carried not less than $3,000 worth of stock. All associated and individual manufacturers of tiles and fireplace fixtures throughout the United States could become non-resident members. The by-laws of the association prohibited dealers and active members from purchasing, directly or indirectly, tiles, etc., for less than list prices. Manufacturers of tiles, etc., were forbidden to sell their products or wares to any person or persons not a member of the association. This association established prices for members and non-members, the prices for the latter being fifty per cent more than for the former. Before the organization of this association L had a profitable tile and mantel business in San Francisco. He never applied for membership in said association, and being unable to procure tile from manufacturers without the state, except for association prices to non-members, and having sustained injury by reason

thereof, brought an action for damages under section 7 of the Sherman anti-trust act against the association and its members. L recovered judgment in the trial court. On writ of error from the circuit court of appeals this judgment was affirmed. In affirming the judgment on writ of error from the United States supreme court it was held that:

(1) A combination or agreement which prevents and bars business dealings by citizens of a state with citizens of other states is in direct restraint of interstate trade or commerce, and unlawful;

(2) In determining the validity of a combination or agreement, the contract, combination, or scheme, is taken as a whole and as one single transaction; and

(3) The fixing of amount of attorney's fees in an action under section 7 of the Federal anti-trust law is within the reasonable discretion of the trial court.

MOORE & HANDLEY HARDWARE CO. v. TOWERS HARDWARE CO.

(87 Ala. 210, 6 So. 41, 13 Am. St. Rep. 23, 1888.)

Construction, Contracts in Restraint of Trade; Corporations, Contracts by Third Persons; Chancery Practice; Injunction.

The complainant corporation, in 1887, purchased of a certain copartnership their entire stock of goods, paying for the same $100 more than the goods were worth, and taking a stipulation from the sellers, as part of the sale, that they would not handle, with one exception, the class of goods thus sold. Afterwards, the members constituting said firm caused the organization of the defendant corporation for the purpose of engaging in the same business in which they were employed as copartners. The complainant corporation thereupon instituted injunction proceedings to prevent the defendant corporation from going into business, claiming that such company, if permitted to carry on business, would perpetrate a fraud upon complainant. After a preliminary injunction was issued the defendant answered, insisting that the contract evidencing said sale by the copartnership was illegal and void because in restraint of trade, and if valid was not binding upon the defendant. The defendant also moved for the dissolution of the preliminary injunction and to dismiss the bill. Both of these motions were overruled. In reversing the lower court and remanding with instructions, etc., it was held that:

(1) The meaning of a contract in restraint of trade is not to be gathered solely from its express terms, but from a consideration of all the circumstances surrounding the parties and attendant upon the transaction; (87 Ala. 210)

(2) Although no time or space is stated in a restrictive covenant made upon the sale of a business, where these ele-

ments can be gathered from the attendant circumstances the agreement will be upheld; (p. 210)

(3) A corporation may be charged with the obligation of a contract entered into between its promoters or prospectors and third persons before incorporation, on the faith of the corporation, intended to inure to its benefit, and which in point of fact does inure to its benefit, even in the absence of an express promise to perform, or ratification on the part of the company after it is *in esse*, on the principle that one who accepts the benefit of a contract which another volunteers to perform in his name and on his behalf is bound to take the burden with the benefit; (p. 211)

(4) "Where associates combine together to create a paper corporation, to cover a partnership or joint venture, and where the stockholders are partners in intention, and have resorted to the fiction of separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of the liabilities resting on its members; and this may be done, although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation, and participated in the effort to avoid it;" (p. 211)

(5) A corporation is not bound by the personal rights, obligations and transactions of its stockholders, whether these rights have accrued or these obligations were incurred before or subsequent to incorporation, the corporation being considered a distinct entity separate and apart from the individuals composing it; (p. 210)

(6) Whenever a bill contains some allegations upon which equity jurisdiction might attach, the bill will not be dismissed for want of equity; (p. 213) and

(7) Upon motion to dissolve a preliminary injunction, such allegations as are denied by answer cannot be considered. (p. 213)

MORE et al. v. BENNETT et al.

(140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216, 1892.)

Restraint of Trade, Associations; Actions and Defenses.

The Chicago Law Stenographers' Association was formed to promote the interests of its members and to establish and maintain reasonable, proper and uniform rates for stenographic work done by them. Underbidding and cutting of rates between members was forbidden under certain penalties. A schedule of rates was thereupon duly adopted by the association. While the plaintiffs and defendants were members of this association, the plaintiffs secured a large contract, or promise for law reporting, and while the plaintiffs were engaged in reporting, under said promise, the defendants attempted to get the work away from them by underbidding them, thereby compelling the plaintiffs to meet such bid. In an action of assumpsit against said defendants for alleged damages occasioned by their acts there was a demurrer to the declaration, which demurrer was sustained. This judgment was affirmed on appeal to the appellate court. In affirming the latter court it was held that:

(1) Any combination between a number of persons engaged in a particular business to stifle or prevent competition, and thereby enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition, is contrary to public policy; (140 Ill. 79)

(2) All contracts or agreements entered into for the sole purpose of stifling competition are void as against public policy; (p. 80)

(3) Contracts made for the purpose of effecting combinations or conspiracies in restraint of trade are absolutely void and are unenforceable; (p. 79) and

(4) Where the sole object of a contract or association is to stifle competition and control prices, the fact that only a small portion of such object has been attained is no defense to the illegality of such association or contract. (p. 80)

MORRILL v. BOSTON & MAINE RAILROAD

(55 N. H. 531, 1875.)

Pooling Arrangements; Statutes; Foreign Corporations; Jurisdiction; Self-Incrimination.

A foreign railroad company obtained the control of one domestic competing railroad company and three other railroads under a contract or arrangement whereby each road was to retain sixty per cent of its gross earnings between all competing points of their respective routes, to pay their respective running expenses, the remaining forty per cent to constitute a common fund to be equally divided between them. Stockholders in one of these railroads brought a bill in equity against their company and its directors and the foreign company and its directors and managers to enjoin the performance of said contract. A special demurrer to this bill was overruled, the court holding that:

(1) A contract between several competing railroads, providing for a division of earnings after deducting a certain percentage for expenses, and making it indifferent to the contracting parties on which of the lines the passengers or freight is carried, contains in itself the most essential element of consolidation, and is unlawful where consolidation of competing railroads is prohibited by statute;

(2) Section 1, chapter 8, Laws 1867, forbidding consolidation by domestic, competing railroad corporations, and making it unlawful for one of such corporations to operate another "under any business contract, lease, or other arrangement, but each and every railroad corporation so situated shall be run, managed and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connec-

tion with other roads, . . . under fair and open competition," is sufficiently broad to forbid any other foreign, legal person or corporation who may get control of such corporation to do the thing which the domestic corporations themselves are thus enjoined from doing;

(3) When a foreign corporation obtains control of a domestic company, the foreign company must manage, operate and control such domestic corporation under the limitations, conditions and restrictions imposed by the laws of the state of its creation;

(4) A stockholder may, in a proper proceeding in equity, restrain and prevent *ultra vires* acts of a corporation, its officers and directors;

(5) When a contract is made in one state, but is performed in another, the courts of the latter state have jurisdiction over the subject-matter of the contract; and

(6) Where the discovery sought by a bill in equity would tend to incriminate the defendant, the same will be refused.

MURRAY v. McGARIGLE et al.

(69 Wis. 483, 34 N. W. 522, 1887.)

Conspiracy, Pleading; Parties to Actions.

The complaint in this case charged substantially that the defendants, Buell, Benjamin, Swan, and others, formed a Coal Association for the purpose of controlling and monopolizing the entire sale and delivery of coal in the city of Milwaukee, and preventing competition and fixing uniform prices at which coal should be sold; that the plaintiff and defendant McGarigle had been in partnership under the name of the latter, and made a contract with defendant Buell by which he was to furnish them at certain prices with all the coal they could sell; that plaintiff put in a bid for furnishing the school board with a large quantity of coal, at such prices that he and McGarigle would have got the contract and made a profit of $2,000; that the defendants also put in bids to the same board at higher prices, and that defendant Buell and the others constituting the Coal Association, maliciously, unlawfully and wickedly conspired to compel the plaintiff to withdraw his bid, by threatening to shut him up in business and furnish him no more coal unless he did so, and by offering to pay him and McGarigle $700 for withdrawing the bid; that the plaintiff, fearing that said threats would be carried out, and believing himself to be unable to contend against the demands of the defendants and of such Coal Association, did withdraw his bid; that defendants, Buell and Swan, agreed to pay him and McGarigle the sum of $700, and that he thereafter received from them the sum of $350 for his share and thereby lost the sum of $1,000, which he would otherwise have made; that in further pursuance of said conspiracy the defendants and other members of the Coal Associa-

tion agreed among themselves not to bid for any public contracts except at prices previously fixed by them, and refused to furnish the plaintiff any coal to fill contracts made by him with certain two societies; that defendants Buell and McGarigle fraudulently and maliciously caused a large number of letters, signed by the latter, to be delivered to plaintiff's customers and others, stating that if plaintiff had contracted to sell coal at less than a certain price such contracts were unauthorized and were cancelled, whereby plaintiff was brought into disrepute and lost the confidence and good will of the people; and that by this means they caused the plaintiff to lose large profits upon sales negotiated by him with said societies and others, and ruined him and drove him out of business and greatly injured his reputation, to his damage in the sum of $10,000. On motions to make the complaint more definite and certain and to strike out a portion of it, and upon demurrers, the court sustained such motions and demurrers. In reversing the lower court it was held that:

(1) In an action for conspiracy, a complaint states a good cause of action when it sets out by way of inducement the circumstances under which the injury complained of was committed, the conspiring together and common purpose of the defendants, the means used to accomplish their common purpose, the object to be attained, the *overt acts* of one or more of the defendants in pursuance of such common purpose, and, lastly, the resulting injury and damage to the plaintiff; (69 Wis. 489, 490)

(2) "Evidence to sustain an action for conspiracy need not be stated in the complaint;" (p. 491)

(3) Where third persons enter into a conspiracy with one partner in a firm to the injury of the other partner or partners, the latter may sue alone all the conspirators, including the partner; (p. 490)

(4) A demurrer for defect of parties should point out the necessary parties defendant; (p. 490)

(5) An objection that the plaintiff has no legal capacity to sue does not go to the cause of action, and cannot be raised by demurrer; (p. 490) and

(6) Where a wrongful act, if taken alone, would constitute a cause of action, but as part of a conspiracy forms one of the *overt acts* in carrying it out, in setting up such act in an action of conspiracy, several causes of action are not thereby united. (p. 490)

NOTE.

After the foregoing case was remanded, a trial resulted in a $4,750 verdict for the plaintiff. When defendants moved for a new trial, the motion was granted upon plaintiff's refusal to remit $3,250. On appeal from this order it was held that (Murray v. Buell et al., 74 Wis. 14, 1889):

(a) In the absence of statute only actual damages are recoverable in an action for conspiracy in restraint of trade; (p. 19)

(b) Whenever a jury renders an excessive verdict, it is proper for the court, in the exercise of its sound legal discretion, to require the plaintiff to remit the excess in damages as a condition for the denial of the motion for a new trial on that ground; (p. 17) and

(c) "A new trial should not be granted on the ground of excessive damages unless it is clear that the damages are materially greater than the evidence will justify." (p. 19)

The case was again before the supreme court in Murray v. Buell et al., 76 Wis. 657, 1890, where it was held that a cause of action arising out of a conspiracy, being a tort, was not assignable either at common law or under section 4253, R. S., as amended by chapter 280, Laws 1887.

NATIONAL BENEFIT CO. v. UNION HOSPITAL CO.

(45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437, 1891.)

Restraint of trade; Sales, Vendor's Covenant, Validity, Test.

A private corporation having an established business in three different states, entered into a contract with another corporation doing a similar business to refrain, for three years, from transacting a certain class or branch of its business and to turn over all of its contracts pertaining to such class or branch to the other corporation, in consideration of the latter corporation's paying certain sums of money to the former and also refraining for three years, from transacting a different class of its business, thereby securing to each corporation an exclusive field in a certain class or branch of business. In an action upon such contract the defendant demurred to the complaint on the ground that the contract was void as being in restraint of trade. In affirming an order overruling the demurrer it was held that:

(1) A sale by a corporation of its business and good will, to another corporation covering a certain territory, with a stipulation that it would refrain from engaging in such business within that territory for three years in consideration of a sum of money, and a stipulation on the part of the purchaser not to engage in a department of its business reserved by the seller, is valid; (11 L. R. A. 439½)

(2) A party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an understanding on the part of the seller not to carry on the same business in the same territory; (p. 440, *et seq.*) and

(3) The question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it operates, and the limits of restraint as to space depends upon the kind of trade or business which is the subject of the contract. (p. 440½)

NATIONAL COTTON OIL CO. v. TEXAS.

(25 Sup. Ct. Rep. 379, 197 U. S. 115, 49 L. ed. 689, Tex. 1905.)

Constitutional Law; Fourteenth Federal Amendment, Due Process of Law, Limitation; Police Power; Statutes, Construction.

The National Cotton Oil Company and the Southern Cotton Oil Company, both New Jersey corporations, were respectively permitted to do business in Texas in 1897 and 1900. The Taylor Cotton Oil Works, a Texas corporation, was organized in 1898. All of these corporations were engaged in the manufacture and sale of cotton seed oil, cotton seed meal and the other by-products of cotton seed. In an action to oust the Natioanl Company from the state of Texas, it was charged that since November 1, 1901, said company was in a combination, pool, trust, etc., with each of the other companies and unknown persons, firms and corporations, whereby prices of cotton seed were regulated and fixed in the state of Texas, contrary to its laws, etc. The defendant interposed a demurrer to this petition on the ground that the statutes under which the prosecution was brought were unconstitutional and amounted to a denial to the National Company of the equal protection of the laws and to a taking of its property without due process of law. On overruling the demurrer the defendant declined to answer further, and judgment forfeiting the license or permit of the National Company followed. This company was also enjoined from transacting any business in the state, except such business as constituted interstate commerce. The court of civil appeals affirmed this judgment. In affirming the state court on a writ of error from the supreme court of the United States it was held that:

(1) The prohibition in the fourteenth amendment to the Federal constitution that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" does not extend to citizens, persons or corporations who combine to control prices, stifle competition and create a monopoly;

(2) A state may, in the exercise of its police power, prohibit or limit combinations which restrain trade or create a monopoly;

(3) "The control of prices through combinations tends to restraint of trade and to monopoly;"

(4) The divisibility of a state statute containing valid and invalid provisions in order to give effect to the valid provisions, is a state and not a Federal question;

(5) When, in the construction of several state statutes, a state court has declared one of them valid by separating it from invalid statutes, such construction is binding upon the Federal courts; and

(6) Although, by section 14 of 1899 anti-trust law, the Act is to be "construed to be cumulative of all laws in force in the state," this does not continue the provisions of the prior anti-trust acts, whether constitutional or unconstitutional, merely because it is declared to be cumulative.

NATIONAL DISTILLING CO. v. CREAM CITY IMPORTING COMPANY.

(86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902, 1893.)

Rebates; Trust Defense; Pleading; Practice.

The National Distilling Company, a Wisconsin corporation, sued the Cream City Importing Company, also a Wisconsin corporation, to recover the purchase price of goods sold and delivered. The action was defended on the ground that the plaintiff, together with divers firms and corporations of other states, constituted a combination in restraint of trade. Another defense to the action was that the goods sold were of an inferior quality. The plaintiff moved to strike out the first defense as irrelevant, and that the second defense be made more definite and certain. No ruling was made on the second portion of the motion. The first portion of the motion was overruled. In reversing the lower court, it was held that:

(1) It is not unlawful for a seller of goods to give a rebate to the purchaser of the same, conditioned upon his continuation of business dealing with the seller for a definite period;

(2) In the absence of statute, a purchaser of goods from an alleged trust or combination in restraint of trade cannot evade payment therefor merely because of the vendor's connection with such so-called trust or combination;

(3) A plea or defense in abatement on the ground of want of proper plaintiff is defective when it fails to allege whether the party not sued is a copartnership or a corporation, and that such a party has an interest in the subject matter of the litigation;

(4) A single motion should contain all of the objections to which a pleading is subject; and

(5) A defense which sets up immaterial matters, and is of a character to embarrass and prejudice the plaintiff in preparing for trial and maintaining his action upon the merits, should be stricken out upon motion.

NATIONAL HARROW CO. v. HENCH.

(27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299, U. S. C. C. A., Pa. 1897.)

Trade Restraint; Patentees.

In consideration of paid-up stock in a corporation about to be organized, the amount of stock to be fixed by arbitration, six leading manufacturers of float spring-tooth harrows, under various United States letters patent, caused the formation of a New York corporation. To this company was assigned, together with the good will of their business, all of their letters patent, with an agreement to assign letters patent relating to said harrows that they might acquire. They further agreed that thereafter they would not be interested in the manufacture or sale of said harrows, except as agents or licensees of said new corporation, and that they would pay to it a certain amount on every harrow manufactured and sold under said license. The new company agreed to and did issue to the persons, firms and corporations so assigning said patents and good will, exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they made and sold prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by this license. It was made a part of the agreement that other manufacturers of harrows might become parties to it. In consequence, twenty-two different persons, firms and corporations entered into said combination, which comprised at least ninety per cent of all the manufacturers of harrows in the United States. The National Harrow Company was subsequently organized under the laws of New Jersey and succeeded to all of the contract rights of the New York corporation. H & D became licensees of the New York company under said arrangement, and subsequently became li-

censees of the New Jersey company. All of the licenses issued by either of the companies were upon like terms and conditions, namely: that the licensees agreed not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than set forth in a schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers; not, directly nor indirectly, to manufacture or sell any other float spring-tooth harrows, etc., than those which they were licensed to sell and market, except for another licensee, and then only of such style as he is licensed to manufacture and sell; and to pay to the corporation one dollar upon each float spring-tooth harrow, etc., manufactured and sold by them agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license, the corporation agreeing to defend all suits for alleged infringement brought against the licensees. Disregarding said license and agreement, H & D proceeded to cut prices of their harrows, etc.; whereupon, the National Harrow Company sought, by bill in equity, to enjoin H & D from further breaking their agreement, to specifically enforce said license, and to account. The defendants, by cross-bill, asked for cancellation of said license contract. The circuit court dismissed both bills. In affirming this decree, the circuit court of appeals held that:

(1) Contracts in general and unlimited restraint of trade are against public policy, and unlawful; and

(2) The ownership of a patent does not confer the right upon the owner or patentee to combine with other owners or patentees for the purpose of restraining the manufacture, controlling the sale, and enhancing prices of their patented articles.

NATIONAL LEAD CO. v. S. E. GROTE PAINT STORE CO.

(80 Mo. App. 247, 1899.)

Unlawful Combination, Corporation and its Stockholders; Legislative Power, Collateral Attack; Trust Defense, Proof; Foreign Corporations, Comity; Instructions.

The National Lead Trust was created in 1887 by a number of stockholders in eight of the principal corporations engaged in the lead business throughout the United States. The express object of the trust agreement was to secure "intelligent co-operation in dealing in lead and its products, and carrying on all other business incident thereto." It provided for the organization of new companies with specified powers; the acquisition of the stocks, bonds and properties of the subscribing companies, and such new corporations as were to be organized, in exchange for trust certificates; and the appointment of nine trustees, who were to prepare trust certificates of the par value of $100 each, which were to be given at par in exchange for bonds and stocks to be taken at an agreed value. The trustees were to supervise all of such corporations and elect their officers. Upon demand of a certain number of certificate holders, the trustees were to render accounts, furnish inventory and appraisement of property held in trust, make a financial report of the affairs of the various companies whose stocks were held in trust, and pay dividends on trust certificates. This trust was to continue twenty-one years and thereafter until a certain number of certificate holders should vote for its termination. During the life of the trust agreement none of the stock, so acquired, was to be disposed of without the consent of a majority of trust certificate holders, except for voting purposes in constituent companies. From the time of

its formation until August, 1891, a large majority (thirty) of all the corporations in all parts of the country engaged in lead business was brought under the control and management of the National Lead Trust, it having issued its certificates to the amount of $90,000,000 for this purpose. On the date last mentioned the certificate holders adopted a resolution authorizing the trustees of the National Lead Trust to perform the following acts: To amend, alter or modify the trust agreement under which said Lead Trust was organized, as should, in the discretion of said trustees, be advisable or necessary to carry out a certain plan of reorganization; to cause the formation of a New Jersey corporation with an authorized capital stock of $30,000,000 ($15,000,000 preferred and $15,000,000 common) and with specified objects; to transfer to such corporation all of the assets then held in trust or represented by the stocks held in trust by said trustees; and to exchange, in certain proportions, the preferred and common shares of the new company for the shares of the National Lead Trust. A New Jersey corporation was thereupon organized in accordance with said resolution, under the name of the National Lead Company. The transfers of property were made, each corporation whose stock had been turned over to the National Lead Trust conveying its plant, entire capital and assets to the new corporation. Some of the Missouri corporations engaged in the lead business became a part of the National Lead Company as assets of the National Lead Trust, and other Missouri corporations were acquired by subsequent purchase. All of the expenses of reorganization were paid by the National Lead Trust. The business of the new corporation was carried on for the same objects and by the same methods which characterized the operations of the National Lead Trust. In 1894 an action against S. E. Grote Paint Store Company was brought by the National Lead Company to recover $1,791.23, balance alleged to be due upon an account for sales of

white lead and oil made by its St. Louis branch. The action was defended upon the ground that the plaintiff was the corporate successor of an illegal combination to establish a trust designed to limit the price and production of the goods involved. By reason of the exclusion of certain testimony and the failure to properly instruct the jury, a verdict was rendered for the plaintiff. In reversing a judgment entered upon this verdict it was held that:

(1) A corporation is a party to an illegal combination within the meaning of anti-trust laws when its stockholders and governing officers combine with each other to violate any of the provisions of such laws through the instrumentality of their corporate entity; (p. 270)

(2) An arrangement whereby the property, assets and stocks of nearly all of the persons, copartnerships and corporations engaged in a certain business are placed in the hands of trustees, for the purpose of suppressing competition, fixing prices of commodities and limiting their production, is in restraint of trade, and unlawful; (p. 266)

(3) Whether a purchaser of assets from, and who is the successor to, an illegal combination, is affected by such illegality, depends upon all the circumstances characterizing the transaction, as well as upon the purchaser's subsequent use of such property; (p. 267)

(4) A legislature has power to enact that inquiries affecting the validity of the charter of a corporation may be made in other proceedings than in actions in the name of the state; (p. 264)

(5) As a general rule, questions affecting the right of a corporation to enjoy its franchise can only be raised in a direct proceeding to annul or forfeit the grant to which the state granting the charter is a party, for the reason that as to third parties the legality of the corporation is avouched by its charter from the state which reserves to itself the power to withdraw the franchises bestowed, upon evidence of fraudulent intention or subsequent abuse; (p. 264)

(6) The real objects of incorporation may be proved *dehors* the articles of incorporation under an act authorizing a private person, in a suit brought against him by a corporation transacting business contrary to its provisions, to plead such violation in defense of the action; (p. 264)

(7) The statutory authority given a private person to plead in defense that the plaintiff constitutes an unlawful combination includes the right to show, when the plaintiff is a corporation, that it was organized for illegal purposes and is engaged in unlawful business; (p. 265)

(8) In support of the defense that a foreign corporation constitutes an unlawful combination it is necessary to show: (a) the legal character and purpose of the plaintiff corporation; (b) that the indebtedness sued for grew out of the transaction of its business in the state; (p. 272)

(9) The doctrine of comity concedes no rights to a corporation of a sister state which are denied by law to a domestic corporation, or which are contrary to the laws of public policy of the state in which the foreign corporation enters for business; (p. 271) and

(10) When it clearly appears from the undisputed facts and documentary evidence that a litigant constitutes, or is a party to, an illegal combination, the question of illegality in the combination should be submitted to a jury as a matter of law and not fact. (p. 272)

NATIONAL SALT CO. v. INGRAHAM.

(143 Fed. 805, U. S. C. C. A., N. Y. 1906.)

Negotiable Instruments; Defenses.

This is the third time the foregoing case came before the circuit court of appeals (see 122 Fed. 40, 1903; 130 Fed. 676, 1904). Gathered from prior reports of the case, the facts are these: In 1899 the National Salt Company, a New Jersey corporation, organized to carry on the manufacture of salt, and having the power, among others, "to purchase, hold, sell, assign, mortgage, pledge, or otherwise dispose of, shares of the capital stock . . . of any corporation of the state of New Jersey or of any other state," acquired the capital stock of the United Salt Company, an Ohio corporation, under an agreement with a majority of the latter corporation's shareholders. The agreement was evidenced by several separate instruments, whereby said shareholders sold their shares in said company to the National Salt Company in consideration of one and one-fourth shares of its preferred stock and one and one-fourth shares of its common stock in addition to $106.25 cash, payable in ten equal semi-annual instalments, the latter amount being equivalent to five years' annual dividends upon the preferred and common stock of the National Salt Company. It was further agreed that the shares of stock thus to be exchanged should be held by the American Trust Company; that all dividends declared upon the preferred and common stock of the National Salt Company should apply as payments *pro tanto* of the money consideration; that the National Salt Company should make its certificates of indebtedness for the money consideration, and the same should be issued by the American Trust Company to the stock-

holders of the United Salt Company, or their assignees, in the amount due to them respectively; that when the certificates were fully paid, the trust should terminate and the deposited stock be delivered to its owners; that in case of failure of the National Salt Company to pay the certificates, according to their terms, the American Trust Company should sell the deposited shares of the United Salt Company, apply the proceeds to the payment of the certificates and pay any surplus to the National Salt Company. In the early part of 1901 Ingraham bought in the open market a number of certificates of indebtedness, issued by the National Salt Company, as aforesaid. Immediately afterwards he had these certificates surrendered and new ones issued to him in their stead. On the refusal to pay the July, 1901, instalment due under said certificates, Ingraham, in July of that year, commenced an action against the National Salt Company for the entire indebtedness becoming due from it at his option. In August, 1904, Ingraham obtained judgment against the National Salt Company in said suit. This judgment has been affirmed, the court holding that:

(1) An instrument is negotiable when it provides for the unconditional payment to the payee therein, or order, of a certain sum of money at a time capable of exact ascertainment, and such negotiability is not impaired because the instrument permits the maker to pay the principal before maturity;

(2) A *bona fide* purchaser of a negotiable instrument purchased before maturity and without notice of its invalidity is protected from the defense that the instrument was executed as a part of a scheme in restraint of trade;

(3) An innocent purchaser of a negotiable instrument is protected unless he has actual knowledge or notice which is equivalent to knowledge of the invalidating facts: It is not enough to defeat this protection that the purchaser may have had knowledge of circumstances which would excite

suspicion in the mind of a prudent man, or was guilty of gross negligence in his failure to make inquiry about facts which could have been ascertained;

(4) Before a defendant is entitled to offer evidence for the purpose of establishing the illegitimate character of an instrument, it is incumbent upon him to prove that the plaintiff had acquired it *mala fides;* and

(5) A *cestui que trust* is precluded by decree or judgment against the trustee only to the extent of the trust property.

NELSON v. UNITED STATES.

(26 Sup. Ct. Rep. 358, 201 U. S. 92, 50 L. ed. 673, Minn. 1906.)

Evidence; Witnesses; Immunity.

On behalf of the United States a petition was filed in one of the United States circuit courts for an order requiring certain witnesses to produce written evidence and testify before a special examiner in the case of United States v. General Paper Company et al., wherein the Paper Company was charged as having been organized for the purpose of suppressing competition between certain paper manufacturers by constituting said company general selling and distributing agent for said manufacturers and thereby restricting the output of the various mills, fixing prices of their products, determining to whom, and the conditions upon which, such products should be sold, directing into what states and places such products should be shipped, and what customers each mill should supply. The several witnesses answered the petition, setting up various defenses. The court thereupon ordered the witnesses to appear and testify as prayed in the petition. On failure to obey this order fines were imposed upon the witnesses, who were ordered to be imprisoned until they complied. On a writ of error from the United States supreme court the judgment of the lower court was affirmed, the reviewing court holding that:

(1) Any element tending to sustain a charge under consideration is material, although in connection with other evidence the element may or may not sustain such charge;

(2) Where a court passes upon the question of the materiality of the testimony of a witness, before the witness can

avail himself on appeal of any erroneous ruling, he must answer subject to the objection;

(3) Where the production of corporate books is sought, a subpœna directed to the corporate officers in control and possession of such books is proper;

(4) A witness cannot set up as his excuse for not testifying another's privilege to refrain from self incrimination; and

(5) The immunity afforded by the Act of February 25, 1903, is sufficient, notwithstanding its failure to protect from prosecutions under state laws.

NOTE.

The character of the alleged unlawful combination involved in the foregoing case is fully set forth in Justice McKenna's statement of facts in Alexander v. United States. In so far as such combination is concerned, it should be noted that there were several separate or independent paper manufacturers who created or organized a corporation to conduct the general selling operations of their respective products. There was no *bona fide* consolidation or merger of interests.

NESTER et al. v. CONTINENTAL BREWING CO. et al.

(161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894, 1894.)

Restraint of Trade. Test; Illegal Contracts, Maxims; Assignment.

The Brewers' Association of Philadelphia, unincorporated, was organized in 1886 for the purpose of regulating the price of beer in the city and county of Philadelphia and in Camden and Camden county, N. J. The members of this association comprised about 45 individuals, firms and corporations, being all of the brewers doing business in said locality, except one. By the rules of the association these members were subject to severe penalties in case of their violation. Through several assignments by a member of this association Nester and others became owners of a large claim against the association. A bill for an accounting and payment of said claim having been filed several defendants demurred. The lower court sustained these demurrers and dismissed the bill. In affirming the decree, it was held that:

(1) A combination among brewers, the object of which is to silence and stifle all competition among themselves is in restraint of trade and void as against public policy; (161 Pa. 480)

(2) The true test of the validity of a contract or combination in restraint of trade is not whether it is in general or partial restraint, but whether the restraint is such as is injurious to the public interests; (p. 481)

(3) In order to invalidate a contract on the ground of public policy, all that is necessary is that the general tendency of such a contract be to injuriously affect the public interests; (p. 482)

(4) Beer is such a commodity as will be protected from impositions upon the public by means of illegal combinations with reference to it; (p. 483)

(5) "Courts will not lend their aid in illegal transactions no matter how disguised;" (p. 482)

(6) Whenever the plaintiff or defendant requires the aid of an illegal transaction to establish a cause of action or defense, a court will not assist him, the maxim being *Ex dolo malo non oritur actio* (A right of action cannot arise out of fraud); (p. 483) and

(7) An assignee of a chose in action founded upon illegality is subject to the disabilities of his assignor. (p. 484)

NEW YORK BANK NOTE CO. v. HAMILTON BANK NOTE ENGRAVING & PRINTING CO. et al.

(180 N. Y. 280, 73 N. E. 48, 1905.)

Appeal and Error; Contracts, Assignment; Sales, Restrictive Covenants; Damages.

Prior to 1891 the New York Bank Note Company, a New Jersey corporation, was engaged in furnishing certain railroads with railroad tickets. The Kidder Press Manufacturing Company was in the manufacture and sale of presses and special attachments for the manufacture of railroad tickets. On the 12th of October, 1891, these companies entered into a written contract whereby the Kidder Company, for a valuable consideration, sold to the Note Company a press for the printing of said tickets and covenanted for twenty years not to sell to any one else any press or presses *with certain attachments* for printing the special tickets printed and used by the vendee. After said sale was consummated, a corporation of the same name as the New York Bank Note Company was organized under the laws of West Virginia, the New Jersey corporation being dissolved upon assigning all of its property and attempting to assign said contract to the West Virginia corporation. The Kidder Company having sold a press with certain attachments to a competitor of the West Virginia corporation, that company instituted injunction proceedings against it. This case was tried several times and finally the appellate division entered judgment for the plaintiff. In reversing this judgment it was held that:

(1) On appeal from an interlocutory judgment and reversal of a finding of fact, the proper practice for the appellate division is to order a new trial, as such court has no

power to make a new finding and modify the judgment so as to accord therewith; (180 N. Y. 290)

(2) An objection to a contract as invalid because in restraint of trade under the Sherman Act cannot be raised for the first time in the appellate court; (p. 293)

(3) An executory contract of a corporation, coupled with liabilities, is not assignable to another corporation without the consent of the other party to such contract; (pp. 292, 293)

(4) An executory contract not necessarily personal in its character, which can consistently with the rights and interests of the adverse party, be sufficiently executed by the assignee, is assignable in the absence of agreement in the contract, but when rights arising out of a contract are coupled with liabilities, such a contract is non-transferable; (pp. 291, 292)

(5) A manufacturer or vendor of an article adapted to special use may, upon its sale, covenant against interference with the exclusive use of such article by the vendee when such covenant is necessary for the reasonable protection of the vendee and is to continue for a limited time; (p. 295) and

(6) In case of the breach of a vendor's covenant not to interfere with the exclusive use of a secret or special process, the proper measure of damages is the difference between the benefit derived from the use of such process and that derived from the using of other processes open to the public at the time and adequate for the attainment of an equally beneficial result. (p. 295, *et seq.*)

NOTE.

Gray, J., concurred in all of the foregoing points except as to the assignability of the contract, holding that the rule stated as to the non-assignability of contracts when coupled with liability has no application to a case involving merely the reorganization of a corporation to take over the properties of the assignor, with like corporate purposes and powers.

NIAGARA FIRE INSURANCE CO. et al. v. CORNELL et al.

(110 Fed. 816, U. S. C. C., Neb. 1901.)

Constitutional Law, Liberty of Contract, Scope; Police Power; Due Process of Law; Federal Jurisdiction; Foreign Corporations.

For nearly twenty years prior to 1897 a number of foreign fire insurance companies were doing business in Nebraska under proper licenses. While thus engaged they spent large sums of money in establishing offices and agencies, and in advertising. For the better conduct of their businesses, and to minimize insurance risks, an insurance expert was employed by these and other insurance companies to fix fair and reasonable rates for various risks, the companies binding themselves to do business only in accordance with the rates thus fixed. In 1897 the Nebraska legislature passed two Acts (c. 81 and c. 79), one relating solely to insurance companies, and the other concerning general trusts and monopolies, prohibiting in the most general terms the making of any contracts or entering into any combinations with reference to lowering or raising prices or rates of insurance or any other article. Whereupon, those of the insurance companies who had been in the state of Nebraska a great number of years brought injunction proceedings against the state auditor, the attorney general and one of the county attorneys, setting up, among other things, the foregoing facts, claiming both statutes to be against state and Federal constitutions, and praying that respondents be enjoined from enforcing them. After a temporary injunction was issued the respondents answered, denying the unconstitutionality of either statute and challenging the com-

plainants' right to raise the question of unconstitutionality. In making the injunction permanent, it was held that:

(1) A statute (c. 79, Laws 1897) defining a "trust" to be any combination of capital, skill, or acts by which persons seek to fix the price of any article, commodity, use, or merchandise with the intent to prevent others in a like business or occupation from conducting the business or occupation; forbidding restrictions in trade, limitation of production or reduction in price of any commodity; prohibiting the prevention of competition in insurance, or in the making, transportation, sale, or purchase of any article; inhibiting the fixing or making of any standard or contract whereby insurance or the price of any article to the public shall, in any manner, be established; declaring all contracts in violation of such statute absolutely void; and exempting any assembly or association of laboring men from the provisions of such statute, is in conflict with the constitutional guaranty of liberty of contract and constitutes class legislation; (p. 823, *et seq.*)

(2) A statute making it invalid for one class of men to do one thing, and lawful for other men, practically under the same circumstances, to do another, but like, thing, constitutes class legislation and is unconstitutional; (p. 825)

(3) The constitutionality of section 3, chapter 79, Laws 1897, imposing right of attorney's fees to be taxed as part of costs against defendant, is questionable; (p. 821)

(4) Where every recital in a statute refers almost directly to every other provision, and illegality permeates its entire scheme, the whole statute will be declared void; (p. 824)

(5) Chapter 81, Laws 1897, is unconstitutional because it interferes with the general right of liberty of contract guaranteed by the Federal constitution; (p. 821)

(6) A legislature has no power to interfere with, or control the general liberty of contract, and a statute interferes with this guaranty when it relates to the general manner of transacting ordinary business; p. 822)

(7) A state's police power is limited by the Federal constitution guaranteeing liberty of contract; (p. 822, *et seq.*)

(8) The legislature is not the only one to declare public policy; (p. 822)

(9) Whenever a party, by appeal or other proceeding, can get a hearing before the courts, and there be given a trial by jury, or a trial according to the recognized chancery practice, as the nature of the case may require, due process of law has been accorded him; (p. 820)

(10) Special proceedings for the determination of grievances constitute due process of law, if along the line somewhere, and by some reasonable method, the aggrieved party can have a hearing in the courts; (p. 820)

(11) When a federal question is involved, federal jurisdiction may be invoked, although there is a plain, speedy, and adequate remedy at law in the state courts; (p. 820) and

(12) A foreign corporation has the right to question the constitutionality of a law affecting it passed after such corporation has lawfully gained admission. (pp. 820, 826)

NOTE.

From the opinion in the foregoing case it appears that the most substantial reason for holding chapters 79, 81 to be unconstitutional is the fact that the terms of these statutes are too general with reference to making certain contracts and entering into combinations. This is not a good reason. Many statutes could be condemned on this account. Yet courts have repeatedly upheld them by limiting general words or terms within proper bounds. Chapter 81 should not have been declared unconstitutional (see 199 U. S. 401). Chapter 79 might have been declared void on the ground that it constituted class legislation.

NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO.

[1894] A. C. 535, Eng.

Restraint of Trade, Unrestricted as to Space.

In 1886 N, being engaged in the business of manufacturing guns and ammunition under certain patents, and having built up a world-wide trade, caused the organization of the Nordenfelt Guns & Ammunition Company to take over his entire business. An agreement was then entered into between N and the Nordenfelt Company whereby, for £237,000 in cash and £50,000 in paid-up stock paid to N said company purchased all of N's stock, plant, good will and patents connected therewith, N covenanting to act as managing director for said company for five years, and, so long as it should continue in business, not to engage, except in its behalf, either directly or indirectly, in the manufacture of guns and ammunition or in any business competing in any way with that carried on by it. In 1888 the Nordenfelt Company and the Maxim Gun Company, desiring to amalgamate their businesses and to form a new company, entered into an agreement between themselves and a third party, who was acting for the new company, whereby the Nordenfelt Company agreed to secure a restrictive covenant from N similar to the one given by him to it upon its purchase from him of his business. After the organization of the new company N entered into a covenant in conformity with the last mentioned agreement, such covenant being necessary for the reason that his covenant with the Nordenfelt Company was limited to the time during which that company should carry on business and because of its contemplated withdrawal from business by the transfer to the new company. N, having broken his new covenant, proceedings were brought against him.

The trial court ruled against the validity of the covenant. On appeal to the Court of Appeal, the lower court was reversed, the covenant being considered valid as to such portion as related to the gun and ammunition business, and was considered invalid as far as it applied "to any business which the company might carry on," etc. In affirming this judgment, the house of lords held that:

(1) Where a business and good will extend over the entire world, a covenant not to compete with the purchaser of such a business, is, when unrestricted as to space, necessary to the purchaser's protection, and not injurious to the public interests, valid and enforcible;

(2) A contract or covenant in general restraint of trade, when made in connection with the sale of the good will of a business, is valid when the full benefit of the purchase can not be otherwise secured to the purchaser, unless the restraint is such as to be injurious to the public; (pp. 548, 549) and

(3) The validity of a contract or covenant in restraint of trade is determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, regardless of whether the restraint is general or particular. (p. 548)

NOTE.

The principal opinion in this case was rendered by Herschell, L. C.; Watson, Ashbourne, Macnaghten and Morris, LL. rendered concurring opinions, that of Lord Macnaghten being the principal one. As to the facts and points of law there is unanimity among all the lords. The principal discussion in the concurring opinions and especially that of Lord Macnaghten is directed to the history and development of the doctrine of restraint of trade and the distinction between general and partial restraint.

NORTHERN SECURITIES CO v. UNITED STATES.

(193 U. S. 197, 48 L. ed. 679, Minn. 1904.)

The shareholders of two competing railroads caused the organization of a third (holding) company for the purpose of acquiring a controlling interest in the management of the constituent companies by virtue of the ownership of a majority of their capital stock, "making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and *by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation,* with not only the power, but the duty, to pursue a policy" whereby *"all inducement for competition between the two systems, was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."* It was held:

(1) That the scheme or device came fully within the purview of the Sherman Act;

(2) That it was not necessary to show an actual intention to violate the Sherman Act;

(3) That a state statute and charter granting the power to hold capital stock in other corporations cannot be used as a cloak to cover a violation of the Sherman Act; and

(4) That the fact that a combination such as is prohibited by the Sherman Act is completed cannot be set up as a defense to an action by the government to declare illegal such combination and frustrate its effect.

The important facts to be borne in mind in the foregoing case are:

(a) The corporations which sought amalgamation were *quasi* public;

(b) They were competing railroads;

(c) There was an express statutory prohibition against one of the companies consolidating with a competing corporation;

(d) The incorporation of the holding company was not a *bona fide* purchase of the stock of the constituent companies, but was organized to accomplish a pooling of profits of these companies; and

(e) The entire control of the constituent companies as railroad corporations was to be dominated by the holding corporation the same as if it was itself a railroad company.

NOTE.

The dissenting opinion of Justice White, in which three other justices concur, recognizes the apparent but not the real object for which the Security Company was organized. In the first place, this opinion reasons that the mere ownership of capital stock cannot come within any definition of commerce. In the second place, it is said that the tenth amendment to the constitution of the United States prohibits Congress to regulate the ownership of capital stock—which is a right of property—such regulation being purely a state matter.

The entire dissenting opinion addresses itself to the form and not the substance of the transaction which the majority opinion condemns as an illegal conspiracy to affect interstate commerce declared such by prior decision; namely, in Pearsall v. Great Northern Railway Company.

Justice Holmes' dissenting opinion, in which a like number of justices concur, dwells upon another phase of the stock ownership question; namely, the right of the Northern Securities Co. to acquire capital stock under the laws of New Jersey, without congressional interference of any kind. Here again the form and not the substance of the transaction is made the basis for the opinion

NORTON v. W. H. THOMAS & SONS CO.

(—— Tex. ——, 91 S. W. 780, 1906.)

Combinations, Wholesale and Dealer.

Here, a foreign wholesaler and dealer contracted for the sale and purchase of a quantity of a certain brand of a commodity at a fixed price. Subsequently, in order to enable the dealer to carry out his part of the contract, the agreement was changed to bind the wholesaler not to sell within a definite territory the same brand of commodity to any one else until the remaining part of the quantity of said brand previously purchased by the dealer was disposed of. Notes were given by the dealer for the purchase price of this commodity. In an action brought against the dealer on unpaid notes his principal defense was that the contract as modified and the notes were unenforcible, being against the 1899 anti-trust act. The court of civil appeals certified the case to the supreme court, which held that:

A contract between a dealer and wholesaler or manufacturer, whereby the latter agrees to sell a commodity exclusively to the former within a definite territory, but which contract does not attempt generally to fix or regulate the price of such commodity, nor to fix or limit its quantity, is not invalid.

OAKDALE MANUFACTURING CO. v. GARST.

(18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784, 1894.)

Consolidation; Public Policy; Foreign Incorporation; Vendor's Covenant.

In 1891, three out of four New England companies, separately engaged in the manufacture and sale of butterine, agreed to consolidate their interests and conduct their business under one corporation partly to stop ruinous competition between them. For this purpose a new corporation, O, was organized under the laws of Kentucky, to which all the stock, machinery, accounts and good wills of the respective concerns were transferred in exchange for shares in the new company. In 1892, G sold his stock to the new company, agreeing not to engage, directly or indirectly, in the manufacture or sale of butterine for five years. After making said covenant, G entered the same business again; whereupon O brought an action to restrain him from violating said covenant. In granting complainant the relief prayed, it was held that:

(1) Where a trade combination does not amount to a monopoly of a business and therefore does not injure the public, it is not against public policy, even though such combination may have the effect of diminishing the number of business competitors;

(2) It is not against public policy of Rhode Island for its citizens to go to another state for incorporation purposes;

(3) A covenant by a seller of a business not to engage, or be concerned, in a similar business for a limited period is not invalid;

(4) Contracts in restraint of trade are not necessarily

void by reason of universality of space, but depend upon the reasonableness of the restrictions under the conditions of each case; and

(5) Whether a contract is, or is not, in restraint of trade should be determined by the subject-matter and the conditions under which the contract was made, by considerations of extensiveness or localism, by protection to interests sold and paid for, by the deprivation of public rights for private gain, and by proper advantage on one side or useless oppression on the other.

OREGON STEAM NAVIGATION CO. v. WINSOR et al.

(87 U. S. 64, 22 L. ed. 315, Wash. 1874.)

Restraint of Trade, Partial Validity, Consideration; Contracts, Divisibility.

C and O, two corporations, were engaged in transportation, C, on the rivers, bays and waters of California, and O on the Columbia river and its branches in Oregon and Washington. C, while thus employed, sold one of its steamers to O, under an agreement by O that such steamer should not be used in California waters for ten years from May 1, 1864. Subsequently O sold the same steamer to W and others, who were engaged in the same business on Puget Sound, Washington Territory, and who agreed not to run and employ said steamer upon any of the routes of travel or rivers, bays or waters of California or the Columbia river and its tributaries, for the period of ten years from May 1, 1867, the stipulation between O, W and others covering a period of three years, which was not necessary to O's protection as against its covenant with C, or in so far as the stipulation concerned California waters. W and others having broken said agreement, an action was brought by O against them to recover $75,000, stipulated damages. On demurrer to the complaint, the action was dismissed. In reversing this judgment it was held that:

(1) A stipulation by a vendor of an article that it should not be used within a reasonable region or distance, so as not to interfere with his business or trade, if founded on a good consideration, is valid; (22 L. ed. 318½)

(2) Where, in the purchase of an article, the purchaser restricts himself in its use, such stipulation will be presumed to

be founded on a valuable consideration in its influence upon the price paid for the article; (p. 319½)

(3) The principal reasons why a contract in general restraint of trade is void as against public policy are: (a) deprivation of the restricted party's industry results in injury to the public, (b) restraint in pursuing one's business or occupation prevents the party restrained from supporting himself and his family; (p. 318½)

(4) Cases involving restraint of trade as against public policy are to be decided according to their own circumstances; (p. 318½)

(5) Agreements in restraint of trade, whether under seal or not, are divisible; (p. 319) and

(6) When an agreement in restraint of trade contains a divisible stipulation, one part thereof being in general restraint of trade, and the other not, and the line of division between the two parts is clearly defined and easily drawn, the valid portion of such an agreement is enforcible. (319½)

OVER v. BYRAM FOUNDRY CO.

(—— Ind. App. ——, 77 N. E. 302, 1906.)

Actions; Trade Restraint.

A manufacturing company agreed in writing to withdraw the price made to the trade of a specified article, and to supply a dealer exclusively with the article at stipulated price for a portion of a year, except as to existing contracts. During that period of time the manufacturer also agreed not to manufacture another commodity, reserving the right to cease manufacturing at any time. In an action by the manufacturer for goods sold and delivered, the dealer set up the improper bringing of the action, the illegality of the contract and its breach. It was held that:

(1) An action for goods sold and delivered is not maintainable where a written contract exists specifying the goods, fixing their terms of sale and delivery;

(2) There can be no breach on account of nonperformance of a contract giving a right to discontinue performance under it;

(3) A contract against monopolies under the statute must be one between persons or corporations controlling the output of a commodity affecting its general production or prices;

(4) Whether there is such restraint of trade as public policy prohibits must be determined from the facts of each case; and

(5) It is not in restraint of trade for a manufacturer to agree with a dealer for exclusive manufacture of goods at a stipulated price and during a limited period.

OWEN COUNTY BURLEY TOBACCO SOCIETY et al. v. BRUMBACK et al.

(107 S. W. 710, Ky. App. 1908.)

Constitutional Law, Legislative Power, Classification; Injunction; Practice.

This was a motion to dissolve an injunction. The petition upon which the injunction was issued in substance alleged that the plaintiff was incorporated under the laws of Kentucky and was a branch of the American Society of Equity; that it was engaged in the business of handling and selling tobacco for many growers who placed their tobacco in its possession for sale; that defendant entered into an agreement with plaintiff pledging his 1907 crop of tobacco for sale and agreeing with it and various members of the society for the handling of his tobacco in common with other tobaccos and for said sale; that he had prized and shipped a part of his said crop and that he was then prizing and preparing to ship the whole of the crop; and that if he was permitted to ship and sell the same, he would thereby breach his said contract and work irreparable injury to the plaintiff and all the members of said pool. In overruling said motion it was held that:

(1) Kentucky Act of March 21, 1906, authorizes the control, regulation and fixing of prices of crops by placing them in the hands of a central agent with power to hold them until a reasonable and adequate price can be obtained; (107 S. W. 714)

(2) The Act of March 21, 1906, although confining the privileges granted by it to farmers, does not in terms prohibt other persons or corporations from pooling their prod-

ucts, or from pledging them to an agent for disposition in order that fair and reasonable prices may thereby be obtained; (pp. 713, 714½)

(3) Under section 198, Kentucky constitution, a trust, pool, or combination, unless created or formed for the purpose of depreciating below its real value any article, or enhancing the cost of any article above its real value, or unless the reasonable effect of the trust, pool, or combination would be to depreciate below its real value an article or to enhance the cost of an article above its real value, is not forbidden; (p. 714½)

(4) Legislative power to select and clasify persons or occupations and the power to enact reasonable laws for the government of each class dealt with, is neither limited by Kentucky constitution, section 3 of the bill of rights, which in part declares that "no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men except in consideration of public service," nor by the police power of the state; (p. 713)

(5) Act of March 21, 1906, constitutes a valid classification and is not within the Fourteenth Amendment to the Federal Constitution, providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the law;" (p. 713½)

(6) A person belonging to a class against whom no discrimination is made or intended to be made by statute cannot claim the invalidity of such statute by reason of its discriminating character; (p. 714)

(7) Where a breach of a contract might cause damage that is not susceptible of proof or estimation, injunction is a proper remedy to prevent such breach; (p. 712)

(8) The filing of a general demurrer to a petition or application for a temporary injunction is improper, because upon such an application, the only matter that can properly be considered by the court is whether or not the verified statements in the petition alone, or when considered in con-

nection with affidavits that might be filed with it, furnish sufficient ground for granting the relief sought; (p. 711½)

(9) The styling of a petition in "ordinay" instead of entitling it a "petition in equity" is no cause for dismissal of the petition, as under section 10, Civil Code of Practice, the case can be transferred to the proper docket during the term of court; (p. 711½) and

(10) Sufficiency of notice of the application for an injunction is waived by appearing and opposing the issuance of the injunction. (p. 711½)

PARK & SONS CO. v. NATIONAL WHOLESALE DRUGGISTS' ASS'N.

(175 N. Y. 1, 67 N. E. 136, 96 Am. St. Rep. 578, 1903.)

This was a suit to declare the National Wholesale Druggists' Association an illegal combination and to restrain its members from carrying out their illegal plans to interfere with complainant's business. The association was voluntary and at one time consisted of about ninety per cent of wholesale druggists or jobbers in the United States. Its object was the establishment and maintenance under agreement between drug manufacturers and wholesale druggists of uniform jobbing prices for fixed quantities of certain drugs and retail selling prices at which druggists were to sell drugs, less a designated commission for handling the same. It being in effect "the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor." None but members of the association could avail themselves of the prices thus established. On demurrer to the complaint, it was held:

(1) That conclusions of law are not admitted by demurrer; (96 Am. St. Rep. 581)

(2) That a manufacturer has a right to adopt any plan whereby his goods shall be sold at uniform prices in all sections of the country; (p. 582)

(3) That dealers have the right to "induce manufacturers to establish a uniform price for fixed quantities so that they can purchase as cheaply as the great merchants and thus compete with them in the retail trade;" (p. 587)

(4) That the doing away with competition among dealers as to price is not in restraint of trade where the dealers are not restricted as to quantity of goods they may sell nor as to territory they shall cover; (p. 582)

(5) That the facts alleged in the complaint did not amount to threats or intimidations against the manufacturers; and

(6) That the allegations as to complainant being boycotted were insufficient. "A boycott means to refuse to sell or to do business with a concern, and to prevent anybody else from doing business with a concern on any conditions." (p. 585)

NOTE.

The real elements of monopoly were not present in the case as presented on the pleadings. It was not shown that a definite number of manufacturers established a monopoly in their goods or that there was a tendency to monopolize anything; nor could it be said that the dealers' association created a monopoly in the sale of such goods. The arrangement amounted to nothing more than an understanding as to commissions to be realized by the members of the dealers' association for their services in handling manufacturer's goods. The fixing of prices was a means to gain said end.

PASTEUR VACCINE COMPANY v. BURKEY.

(22 Tex. Civ. App. 232, 54 S. W. 804, 1899.)

Exclusive Contracts; Foreign Corporations, Interstate Commerce; Practice; Evidence.

In 1895, the Pasteur Vaccine Company and F. J. Burkey entered into a contract whereby the former granted the exclusive right to use and sell vaccine at fixed prices within a designated territory to the latter, who agreed to use and sell said vaccine, to make every possible effort to introduce the same, and not to purchase vaccine from any one else within said territory. The contract was to continue for one year, and was made renewable, by mutual consent, at the expiration of said term. In an action begun by the Vaccine Company against B, upon an account for vaccine, B claimed in reconvention or set-off a certain amount as damages for breach of contract. The trial resulted in a verdict and judgment for the defendant. In reversing said judgment it was held that:

(1) A contract for the exclusive sale of a manufacturer's or producer's product within a designated territory is within Rev. St., art. 5313, et seq., and unlawful;

(2) An illegal contract cannot be made the basis for a claim of damages on account of its breach;

(3) Where the subject-matter of litigation is interstate commerce of a foreign corporation, such corportion may sue in state courts, although it has not complied with foreign corporation laws as a precedent condition to doing business in the state;

(4) When an illegal contract is the foundation for an action an appellate court will, of its own motion, refuse its enforcement;

(5) "Parol evidence to show what the parties to a written contract understood as to the length of time it had to run is inadmissible, where the contract, by its terms, stipulated that it should continue for a year;" (syl. 6) and

(6) "Parol evidence is admissible to show whether or not a written contract has been renewed which, by its terms, provides that it shall continue for a year, but shall be renewable by mutual consent."(syl. 7)

NOTE.

Point (1), which is the principal ground for the decision, is not good law, even in Texas. Vandeweghe v. American Brewing Company decides that an agreement by a manufacturer or producer not to sell his product within a designated territory, except to a certain dealer, is not within Rev. St. 1895, art. 5313.

PEARSALL v. GREAT NORTHERN RAILWAY CO.

(161 U. S. 646, 40 L. ed. 838, Minn. 1896.)

Constitutional Law, Impairing Contract, Unexpected Power as Vested Right; Corporate Stock Ownership.

A majority of the Northern Pacific Railroad Company's mortgage bondholders entered into an arrangement with the Great Northern Railway Company by which the property of the Northern Pacific was to be sold to a bondholders' committee, which was to organize a new corporation which should issue its bonds to the aggregate amount of $100,000,000, or more, payment of which was to be guaranteed by the Great Northern, and capital stock to the further amount of $100,000,000, one-half of which was to be transferred to the shareholders of the Great Northern, and should enter into a traffic contract with it, whereby the two companies should thereafter exchange traffic at all intersecting and connecting points, and divide the common earnings from such exchanged traffic on the basis of miles hauled on the two systems respectively. The Great Northern Railway Company was a corporation of Minnesota, deriving its franchises through special Acts of 1856 and 1865. The first Act contained a provision (sec. 17) authorizing any subsequent legislature to amend it "in any manner not destroying or impairing the vested rights of said corporation." The amendatory Act of 1865 authorized the Great Northern to consolidate its capital stock with the capital stock of any other railroad having the same general direction, and to consolidate the whole or any portion of its main line or branches with the rights, powers, franchises, grants and effects of any other railroad. The Northern Pacific Railroad Company derived

its corporate existence from Congress. At the time said arrangement was entered into the Northern Pacific system was in the hands of receivers appointed in a proceeding to foreclose the mortgages which secured the bondholders who were parties to said agreement or arrangement. Some of the lines of both systems were parallel and competing. In 1874, the Minnesota legislature passed an Act forbidding railroad corporations or their lessees, purchasers or managers to consolidate the stock, property or franchises of their corporations with parallel or competing lines. In 1881 said legislature passed a similar Act. Pearsall, a stockholder of the Great Northern Railway Company, filed a bill to enjoin his company from entering into or carrying out said agreement. The case was first heard upon motion for injunction, which was denied. It was again heard upon a final hearing, when the bill was dismissed. In reversing the lower court it was held that:

(1) A power conferred upon a corporation to do certain things necessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, so long as such power is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked if its possible exercise is found to conflict with the interests of the public; (40 L. ed. 847½)

(2) Where, by a charter, a general power is given to consolidate with, purchase, lease, or acquire, the stock of other corporations, and such power remains unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to consolidation with or purchase or lease of competing corporations;

(3) Property rights acquired under a corporate charter, in so far as they are necessary to the full and complete enjoyment of the main object of the grant, are protected by the contract clause of the Federal Constitution; (p. 843½)

(4) Statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do

not interfere substantially with the enjoyment of the main object of the grant, do not impair the same; (p. 845)

(5) A legislative grant, to be within the protection of the contract clause of the Federal Constitution, must be found upon a good consideration, "if it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license;" (p. 845½)

(6) State grants are construed strictly against the grantees, and nothing is presumed to pass except what is clearly expressed; (p. 844½)

(7) It is within the power of a legislature to prohibit or regulate monopolies; (p. 848½)

(8) "An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contains words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed;" (p. 844½)

(9) Where a statute prohibits one corporation from acquiring a controlling share of the stock in another competing company, a transfer of a majority of shares in such company to shareholders instead of the corporation, when for its benefit, is unlawful; (p. 847) and

(10) An arrangement whereby an insolvent railroad company, in return for a guaranty of the payment of principal and interest upon all bonds to be issued by it as reorganized, is to transfer, when reorganized, half of its stock to a trustee for the benefit of another competing railroad corporation and its stockholders, thereby enabling it to obtain complete control over the railroad making such transfer, is within railroad anti-trust laws of 1874 and 1881.

PENSACOLA TELEGRAPH COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

(96 U. S. 1, 24 L. ed. 708, Fla. 1878.)

Exclusive Privileges; Constitutional Law.

From 1859 to 1862 the Pensacola Telegraph Company, a voluntary association, owned and operated a line of electric telegraph along the right of way of the Alabama and Florida Railroad, from Pensacola, Florida, to Pollard, Alabama. This enterprise was subsequently abandoned. In 1865 a new association of the same name was organized which purchased the property of the old association and rebuilt said line of telegraph. This association, in December, 1866, was incorporated by special Act of the Florida legislature granting to the company, for a period of twenty years, "The sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point" in Florida or any other state. After the organization of said company under said Act, it became the owner and operator of said line of telegraph. In 1873 and 1874 the Florida legislature passed certain other Acts authorizing the Pensacola and Louisville Railroad Company, the successor of the Alabama and Florida Railroad Company, to construct, maintain and operate a telegraph line within the territory embraced by the exclusive grant to the Pensacola Telegraph Company. These powers were afterwards transferred by the Pensacola and Louisville Railroad Company to the Western Union Telegraph Company. By an Act of Congress of July 24, 1866 (14 Stat. at L. 221, Rev.

Stat., sec. 5263, *et seq.*), authority was given to any telegraph company then organized, or which should thereafter be organized, under the laws of any state in the union, to construct, maintain and operate lines of telegraph, etc., upon acceptance of said Act. This Act was duly accepted by the Western Union Telegraph Company, a New York corporation, in 1867. Upon the Western Union Telegraph Company's attempting to avail itself of the rights and privileges obtained by it from the Pensacola and Louisville Railroad Company, the Pensacola Telegraph Company, claiming said exclusive right under its said charter, filed a bill to enjoin said company from exercising said rights. On a hearing in the circuit court the bill was dismissed. In affirming this decree it was held that:

(1) When congress has constitutionally assumed control and regulation of a certain business, a state cannot by exclusive grant create an absolute monopoly in such business by shutting out interstate trade; (24 L. ed. 711)

(2) Interstate commerce cannot be obstructed by state legislation through the granting of exclusive privileges; (p. 711) and

(3) "A law of congress made in pursuance of the constitution, suspends or overrides all state statutes with which it is in conflict." (p. 710.)

NOTE.

Field and Hunt, JJ., dissented. The dissent of Justice Field is based on the principal ground that an act of congress cannot interfere with a state regarding intrastate business; that the act of congress in question was inapplicable in so far as it included private business of a telegraph company; and that a state has an absolute power to grant exclusive privileges and franchises within its jurisdiction.

Hunt, J., dissented merely "on the ground that the act of congress was intended only to apply to lines constructed upon the public domain."

PEOPLE (ex rel. AKIN) v. BUTLER STREET FOUNDRY & IRON CO.

(201 Ill. 236, 66 N. E. 349, 1903.)

Constitutional Law; Immunity Statute, Scope; Extraterritorial Operation, Rule; Reasonable Classification; Amendment, Repeal; Offenses.

By anti-trust act of 1891 as amended in 1893 (Laws 1893 p. 89) the secretary of state is required to secure from corporations affidavits showing whether they are members of or interested in any trust, combination or association of persons to regulate or fix prices and to fix or limit production of any articles of merchandise or commodity. The failure or refusal to make such an affidavit within a specified time is made punishable by a $50 fine for each day after such refusal, which fine the state's attorney, under the attorney-general's direction, is authorized to recover, in an action of debt, or he may proceed to forfeit the charter of the defaulting corporation. Said Act contains a provision (sec. 7b) "that no corporation, firm, association or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this Act, or truthfully disclosed in any testimony elicited in the execution thereof." The Butler Street Foundry & Iron Company, an Illinois corporation, was requested by the secretary of state to make such an affidavit, through its president, secretary, treasurer, or one of its directors, but refused to do so. An action was thereupon brought by the people of the state at the relation of the attorney-general against said company to recover said penalty. Judgment having been rendered for the defendant, the case was appealed. In reversing the lower court it was held that:

(1) A statutory provision granting immunity to any corporation, firm, association or individual from any criminal prosecution by reason of anything truthfully disclosed by the anti-trust affidavit, or in any testimony elicited in the execution thereof, as required by an anti-trust act, is coextensive with a constitutional privilege that no person shall be compelled in a criminal case to give evidence tending to incriminate himself;

(2) An immunity statute must be as broad as the constitutional privilege against self-incrimination;

(3) When testimony sought cannot be used as a basis for or in aid of a prosecution which might be followed by fine or imprisonment or involve a penalty or forfeiture, by reason of an immunity, the constitutional privilege from self-incrimination cannot be claimed;

(4) The words "truthfully disclosed" employed in the immunity provision of the 1891 anti-trust act signify that the answer to the inquiry of the secretary of state be made under oath, and, when made, shall be the truth—these words do not amount to a condition upon which the immunity is granted;

(5) The words "criminal cases" used in the immunity provision of 1891 anti-trust act extend to and include imprisonment, fine, forfeiture and penalty, whether recoverable in a criminal or civil proceeding;

(6) An immunity provision can extend only to prosecutions under the laws of the state granting it;

(7) Immunity statutes are given a reasonable construction;

(8) The anti-trust law of 1891, as amended, only requires the affidavit to state whether or not the corporation upon whose behalf it is made has violated the statute by performing some one or more of the acts therein prohibited within the state of Illinois, and does not include acts that might connect it with any trust, pool, combination, etc., formed outside of the state, and which would violate the anti-trust statute of the United States;

(9) In construing a statute courts exclude from its oper-

ation subjects or classes upon which the legislature has no power to legislate, although comprehended within the general terms of the act, unless the different parts of the statute are so connected that they cannot be separated without destroying the evident intention of the legislature;

(10) The placing of corporations in a class by themselves and requiring them to file an anti-trust affidavit, leaving individuals and partnerships simply liable for the penalties provided for by an anti-trust act, is not an illegal or arbitrary classification;

(11) An exemption of building, loan and homestead corporations from an anti-trust act is a natural, and not an arbitrary, classification;

(12) The insertion at length of an amendment in an old act does not, of itself, operate as a repeal of the act amended;

(13) Amendatory anti-trust act of 1893, consisting of sections 7a and 7b (Laws 1893 p. 89), is constitutional;

(14) Amendatory Act of 1893 did not repeal, by implication, the Act of 1891;

(15) The whole Act of 1893, Laws of 1893, p. 182, is unconstitutional, and void;

(16) The amendment of 1897 to the Act of 1891 is unconstitutional, and void; and

(17) The mere failure or refusal to furnish an anti-trust affiidavit after request by the secretary of state is, under the statute, a separate offense, upon which an action for the penalty specified in the statute might be based.

NOTE.

Point 17 is criticised in State v. International Harvester Co. (96 S. W. 119, 1906) as unsound, although it is admitted that the phraseology of the Arkansas anti-trust act is different from that of the Illinois provision on the same subject. In the Arkansas Case it was held that the mere failure or refusal to make an anti-trust affidavit did not constitute an offense under the Arkansas statute.

PEOPLE (ex rel. PEABODY) v. CHICAGO GAS TRUST COMPANY.

(130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 1889.)

Corporations, Powers; Corporate Stock Ownership; Control of Competing Companies; Pleading; Quo Warranto.

Previous to 1887 the only gas companies operating gas plants and selling gas in the city of Chicago were the Chicago Gas Light and Coke Co., the People's Gas Light and Coke Co., the Consumers' Gas, Fuel and Light Co. of Chicago, Ill., afterwards merged into the Consumers' Gas Co., and the Equitable Gas Light and Fuel Co. of Chicago. Their aggregate capitalization was $16,984,200. The Chicago Gas Trust Co. was organized in 1887 under the Illinois general incorporation act, with an authorized capitalization of $25,000,000, for the purpose of building, maintaining and operating gas works in Chicago and elsewhere in Illinois, and for the manufacture, supply, sale and distribution of gas and electricity, or either; and also for the purpose of purchasing and holding or selling the capital stock, or purchasing or leasing and operating the property, plant, good will, rights and franchises of all gas works, or gas company or companies, or any electric company or electric companies in Chicago or elsewhere in Illinois. After incorporation, the Chicago Gas Trust Co. acquired a large majority of the shares of stock of the four old gas companies. The attorney-general thereupon filed an information in the nature of a *quo warranto* against said company, setting up the organization and the nature of the business of the various Chicago gas companies, and charging the Chicago Gas Trust Co. with having unlawfully acquired a majority of the capital stock of the old gas companies and with exercising com-

plete control over them. In some of the pleas filed to the information the ownership by the Chicago Gas Trust Co. of a majority of the shares of stock in the four old gas companies was admitted, but this was justified by the objects of incorporation set forth in the statement claiming such power filed with secretary of state under the general incorporation statute. A demurrer to a number of pleas to said information was overruled by the trial court and final judgment of *nil capiat* was rendered. In reversing said judgment, it was held that:

(1) A corporation organized under the Illinois general incorporation act has no power to purchase and hold shares of stock in other corporations; (130 Ill. 285)

(2) "Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation;" p. 283)

(3) "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it;" (p. 283)

(4) Without special legislative authority, a manufacturing corporation has no power to invest its surplus in the capital stock of other manufacturing companies as an incidental power to the right of manufacture and sale; (p. 283)

(5) A corporation formed for the purpose of erecting or operating gas works, and manufacturing and selling gas, has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation; (p. 288)

(6) A power to purchase capital stock includes the power to purchase all shares of stock; (p. 290)

(7) A corporation organized under a statute which authorizes corporations to be formed "for any lawful purpose,"

with the object of purchasing and holding all the shares of the capital stock of any other corporation, is not organized for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void; (p. 292)

(8) The word "unlawful" as applied to corporations is not used exclusively in the sense of *malum in se,* or *malum prohibitum,* but is used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; (pp. 292, 293)

(9) Where an independent corporation obtains control of capital stock of competing companies, the natural tendency is to thereby suppress competition and create a monopoly in the business of such corporatons; (p. 292)

(10)"Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful;" (p. 293)

(11) "Whatever tends to create a monopoly is unlawful as being contrary to public policy;" (p. 293)

(12) It is doubtful whether a corporation may be organized for two distinct purposes under the Illinois general incorporation act; (p. 290)

(13) A provision in the declaration of corporate purposes of a corporation organized under a general statute, the necessary effect of which is the creation of a monopoly, is void; (p. 295)

(14) A plea which does not answer the opposite pleading is demurrable; (p. 281) and

(15) A plea to an information in the nature of a *quo warranto* should set forth particularly and in detail the facts which show how the corporate power or franchise was conferred upon or acquired by the defendant. It is not enough to allege generally that the power or franchise in question was among the powers conferred by the charter. (p. 288)

PEOPLE v. CHICAGO LIVE STOCK EXCHANGE.

(170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404, 1897.)

Contract, Liberty of; Corporations, By-Laws; Quo Waranto.

The Chicago Live Stock Exchange was incorporated for the purpose of establishing and maintaining a commercial exchange, promoting uniformity in the customs and usages of merchants, providing for the speedy adjustment of all business disputes between its members, facilitating the receipt and distribution of live stock, providing for the maintenance of a rigid inspection thereof, and generally securing to its members the benefit of co-operation in the furtherance of their legitimate pursuits. The membership of this Exchange was composed of live stock commission merchants doing business at the stock yards in the city of Chicago. One of the rules or by-laws adopted by this Exchange regulated the number and employment of traveling solicitors, requiring such solicitors to be members of the Exchange, and to receive a stipulated salary instead of commissions dependent upon earnings, and restricting their operations within certain territory. Any violation of this rule or by-law subjected the offender to a monetary penalty and expulsion from the Exchange. In a petition by the state's attorney on the relation of one of the members of said Exchange for leave to file an information in the nature of *quo awrranto* against said Exchange, it was charged that said by-law or rule was in restraint of trade in that it interfered with the business rights of the members of the Exchange; that said Exchange threatened the enforcement of said by-law against the relator and other members; and that such action would ruin the business of such member. On a rule to show cause why the petition should not be granted, the defendant answered, attempting to justify the pas-

sage and operation of the by-law in question. At the hearing of the petition and answer, the court denied the prayer of the petition and dismissed the same. In reversing this judgment and remanding with directions to grant leave to file the information, it was held that:

(1) A by-law of a private corporation which restricts competition by prohibiting individual members from contracting and engaging in lawful business and from using such lawful agencies as they may desire, when not required for corporate purposes nor within the charter powers, is against public policy and void; (170 Ill. 570)

(2) By-laws of a private corporation must be reasonable and for corporate purposes, and must not infringe on the constitution, the general law of the land, or the policy of the state, nor be hostile to public welfare; (p. 570)

(3) Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law; (p. 566)

(4) Everyone has a right to dispose of his skill and industry, and contract in reference thereto with whom he pleases and at such contract rates as may be agreed on, which right is not allowed to be trammeled with restrictions interfering with individual action and liberty; (p. 566)

(5) Public policy requires that corporations, in the exercise of their powers, should be confined strictly within their charter limits, and not be permitted to exercise powers beyond those expressly conferred; (p. 571)

(6) Where a corporation attempts to place restrictions on trade and commerce and to fetter individual liberty of action by preventing competition, such acts are hostile to public welfare and constitute an abuse of the corporate franchise; (pp. 570, 571) and

(7) Whenever a corporation is guilty of misconduct or an act which tends to produce injury to the public, the state may proceed to claim a forfeiture of its charter by an information in the nature of *quo warranto.*

PEOPLE v. DUKE et al.

(44 N. Y. Supp. 336, 1897.)

Corporations; Conspiracy; Officers and Agents; Indictment.

An indictment charged certain officers and agents of the American Tobacco Company with having conspired with others to monopolize the entire cigarette business throughout the United States—an act injurious to trade—namely, by raising the price of such cigarettes, fixing and maintaining a standard price, and preventing all wholesale dealers and jobbers in cigarettes from selling such cigarettes at a price less than the fixed standard; by limiting, fixing and controlling the production, manufacture, and output of cigarettes; by coercing such jobbers and dealers to deal exclusively in certain cigarettes; and by refusing to sell to all who dealt in cigarettes of any other manufacture. In overruling a demurrer, it was held that:

(1) Officers and agents of a corporation confederating to create a monopoly by threats and menaces directed against competitors are guilty of a criminal conspiracy;

(2) Aside from its officers and agents, a corporation has no capacity to conspire with other corporations or persons;

(3) Agents, officers and directors of a corporation may become criminally liable for their illegal acts, although the acts constituting the crime are done in behalf of the corporation; and

(4) An unlawful monopoly in a lawful trade does not depend on its character.

PEOPLE v. KLAW et al.

(106 N. Y. Supp. 341, 1907.)

Conspiracy.

A number of owners of theaters entered into a contract in 1896, whereby each of the parties was to contribute some of the theaters owned or controlled by him in order to establish a continuous chain of theaters throughout the United States, at which their several attractions could be produced in turn, bookings to be arranged in conjunction with each other so as to avoid needless expense in travel, and to prevent competition from indiscriminate bookings. This contract bound the parties either to play their attractions in the theaters owned by the parties to the agreement or to remain out of the cities in which their theaters or places of amusement were located, unless consent to play in an opposition theater was obtained from the party having the theater at the competitive point. Each of the parties to the agreement was to perform certain duties, and the net profits and other income derived from the theaters were to be divided between them in equal shares or proportions. Provision was also made for bringing in other theaters from time to time under the terms of the contract. A similar contract was entered into by the same parties in 1900. In accordance with the provisions of these agreements, a very large number of booking contracts were entered into from time to time between the parties to the agreement and third parties owning or managing plays or attractions. In pursuance of the terms of the so-called booking contracts, the parties therein, acting as directors and agents of and for the theaters or managers thereof, agreed to furnish to the parties specified in the agreement a particular theater, with equipment and employees, for a specified

period, and the owners of the attraction, in consideration thereof, agreed to furnish complete scenic properties and everything necessary to the proper production of the play or entertainment on the stage. In 1907 two of the parties to these agreements were indicted upon the charge of conspiracy under the Penal Code, section 168, subdivisions 5 and 6. After obtaining an order for leave to inspect the stenographic minutes of the evidence and proceedings taken before the grand jury, the defendants moved to dismiss the indictment, the principal ground being that the evidence failed to show that any crime had been committed by them. In granting this motion and dismissing the indictment, it was held that:

(1) To constitute a criminal conspiracy under subdivisions 5 and 6, sections 168, Pen. Code, there must be a corrupt agreement between two or more individuals entered into with a criminal intent to prevent someone from exercising a lawful trade or calling, which must be followed by the doing of such an unlawful act; (p. 344) and

(2) Plays and entertainments of the stage are not articles or useful commodities of common use, and the business of owning, leasing, and controlling theaters, and producing plays therein, is not trade or commerce within the meaning of subdivision 6, section 168, Pen. Code. (p. 353)

PEOPLE v. MILK EXCHANGE.

(145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609, 1895.)

Corporate Franchise, Misuser; Conspiracy in Restraint of Trade, Stockholders; Public Prosecutor's Motives.

A large number of milk dealers and creamery or milk commission men, doing business in the City of New York and vicinity, organized a Milk Exchange, the object of which was the "buying and selling of milk at wholesale and retail." Immediately after organization a by-law was adopted at a stockholders' meeting of the Exchange giving its board of directors authority to make and fix a standard or market price at which milk might be purchased from stockholders of said company or Exchange. Instead of pursuing its corporate object the Exchange merely looked up dealers for farmers, had the farmers ship milk direct to the dealers at prices fixed by the Exchange, and guaranteed collections in consideration of a certain commission. After the Exchange was in operation for several years, an action was brought on behalf of the people to have the company dissolved and its charter vacated for non-user and for being an illegal combination. The trial court dismissed the complaint. This judgment was reversed by the supreme court. In affirming said reversal, it was held that:

(1) A private corporation's charter is forfeitable at the instance of the state for misuser of the corporate franchise by the stockholders;

(2) Stockholders of a corporation may be guilty of a conspiracy in restraint of trade;

(3) Any combination tending to restrain competition or enhance prices is in restraint of trade and illegal; and

(4) Outside influence brought to bear upon a public officer charged with the duty of prosecuting an unlawful combination is immaterial in the consideration of the merits of a prosecution.

PEOPLE v. (The) NORTH RIVER SUGAR REFINING CO. CO.

(121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 834, 1890.)

Corporate Franchise, Forfeiture; Corporate Partnerships; Consolidation.

An individual, four partnerships and eight corporations associated themselves under an agreement to promote economy in refining sugar, make use of each other's appliances and processes therein, furnish protection against unlawful labor combinations, and otherwise promote each other's interests. For these purposes such of the parties as were not corporations agreed to organize themselves into corporations. When all of the parties were thus organized, it was agreed that all of the shares of the capital stock of such corporations should be transferred to a Board, consisting of eleven persons, which Board could be increased and vacancies therein filled in a certain manner. This Board was to have absolute control over such corporations and was to make by-laws for its regulation and transaction of business. Each corporation's profits were to be paid over by it to said Board, which was to declare and distribute dividends upon trust certificates issued in exchange of said shares of stock. The corporations entering into said agreement were to maintain their separate organizations and carry on their own businesses. Provision was made for the acquisition of other refineries. This agreement was to take effect October 1, 1887. After making said agreement four other corporations became parties to it. The North River Sugar Refining Company, a New York manufacturing corporation, became a party to said agreement August 16, 1887, by the action of its secretary; and

on November 4, 1887, at a meeting of said company's stockholders, an attempt was made to withdraw from said trust agreement. The same stockholders, at a subsequent meeting, authorized a sale to an individual of all the stock of The North River Sugar Refining Company. This transaction was regularly carried through on the books of said company. The vendee of said stock, in turn, delivered it to the trustees of said trust agreement, receiving therefor trust certificates for more than double the amount of the stock. On account of said company's action in becoming a party to said trust agreement the attorney-general brought an action against it to have it dissolved, its charter vacated and its corporate existence annulled. Judgment of forfeiture followed. In affirming this judgment it was held that:

(1) A corporation's charter may be forfeited whenever its stockholders delegate its functions to others than its lawfully authorized managers, and transfer all of its property for other than corporate purposes;

(2) An agreement between several corporations and their stockholders whereby all of their shares of the capital stock are transferred to trustees, to be held by them in trust, with absolute control over such corporations, is unlawful; (121 N. Y. 615)

(3) Corporate partnerships are unlawful; (p. 623)

(4) "A trust of personal property may be created by parol;" (p. 616)

(5) Where a consolidation of several corporations is permissible under a statute, such consolidation can only be accomplished in the manner prescribed by such statute; (p. 625)

(6) Where actual corporate conduct is directed or produced by the whole body of officers and stockholders of a corporation, such conduct is of a corporate character, and, if illegal and injurious, may be made the basis for a dissolution of the corporation in whose behalf such parties are acting; (p. 619)

(7) After a contract is executed, an authority granted thereby becomes irrevocable;

(8) In a proceeding by the state against a corporation, to forfeit its franchise, the burden is upon the complainant to establish its charges; (p. 608) and

(9) A violation of the law of a corporation's being which has produced or tends to produce injury to the public must be proven before its charter can be declared forfeited. (pp. 608, 609)

PEOPLE v. SHELDON.

(139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690, 1893.)

Conspiracy, Trade Restraint, Overt Act; Proof.

Fourteen out of fifteen retail coal dealers in the city of Lockport, New York, associated themselves as the Lockport Coal Exchange under a constitution and by-laws. The objects expressed in this instrument were to foster trade and commerce in coal, wood, and other products, to protect from unjust and unlawful exactions, to diffuse information concerning customers, to settle differences, to produce uniformity and certainty in the customs and usages of the trade, and to establish rules and regulations as might be proper and necessary for the mutual co-operation, interest and protection of the retail dealers in coal and wood in the city of Lockport. By this instrument it was declared that the price of coal at retail should, as far as practicable, be kept uniform; that it should require a five-sixths' vote of all members of the Exchange to advance or reduce the retail price of coal; that no price should be made at any time which would be more than a fair and reasonable advance over wholesale rates, or which would be higher than the current prices of certain Exchanges, figured upon corresponding freight tariff, and that at no time should the price of coal at retail exceed $1 above the cost of the same at wholesale, except by the unanimous vote of all the members of the Exchange; that the sale of coal should be made through the nominal channels of trade; that soliciting should be discouraged, and no club orders of associated buyers to reduce prices should be considered or accepted; and that no member should employ any person temporarily to solicit orders, nor display any sign indicating that orders for coal would be taken at outside places. Officers and committees of the Ex-

change were provided for, one of such officers being a secretary, who, it was agreed, should be permitted to see any portion of the books of any member, when in pursuit of wrongdoing, and to demand an affidavit, when he thought it necessary, to refute or sustain any specific charge. Any member charged with violating any provision of the by-laws, or any rule or resolution of the Exchange, or being guilty of conduct unbecoming a member, or giving short-weight or over-weight, was liable to be summoned before the secretary, and if the charge was regarded by him as sustained, the member was considered to be "in default" until five-sixths of all the members should vote to reinstate him. A member in default forfeited all rights to any moneys or property held by the Exchange as its own or in trust, and all rights of membership, unless he was reinstated and deposited with the treasurer $100 as a fee for renewal of membership. A member accused in open meeting by the secretary of having violated any provision of the constitution or by-laws, or of any resolution, was required to make an affidavit that he had in no instance sold or delivered coal for which he had not received the full price at which the majority of the other members were selling coal of the same size at the same time; that he had not directly or indirectly, given any rebate, commission or other concession equivalent to cash, thereby actually reducing the established market price made by the Exchange; and that not less nor more than 2000 pounds had, to his knowledge, been sold by himself, his partner, or any employees, and delivered as a ton. The scheme of the organization, if fully carried out, practically compelled every dealer in coal at that city to join the association and regulate his business by its constitution and by-laws. In a prosecution for conspiracy against several of the members of said Exchange, it was charged that the agreement constituted an unlawful conspiracy to increase the price of coal at retail in the city of Lockport, and that in pursuance of it

the defendants and other members of the Exchange elected officers, and, by resolution, fixed and established the rate and price of coal at various sums higher than the previous market price of coal of like quality at retail in the city. The proof sustained these charges and a conviction followed. In affirming the lower courts it was held that:

(1) A combination of independent dealers to prevent competition between themselves in the sale of an article of prime necessity is within section 168, Penal Code, making it a misdemeanor to conspire to commit any act injurious to trade or commerce, although the object of the combination is merely the due protection of the parties from ruinous rivalry, and no attempt is made to unduly enhance prices;

(2) Agreements to prevent trade competition are in contemplation of the law injurious to trade because they are liable to be used injuriously; (139 N. Y. 264)

(3) Competition is the life of trade; (p. 263)

(4) The gravamen of the offense of conspiracy is the combination; (p. 264)

(5) An agreement having for its object the prevention of competition is illegal regardless of what may be done under the agreement; (p. 262)

(6) At common law the offense of conspiracy is complete on proof of the unlawful agreement, it being unnecessary to allege or prove any overt act done in pursuance of the agreement; (p. 265)

(7) The common law rule that it is unnecessary to allege or prove any overt act committed in furtherance of a conspiracy has been changed by section 171, Penal Code, which requires some act to be done by one or more of the parties in pursuance of an agreement to constitute it a criminal conspiracy; and

(8) Under section 171, Penal Code, which is a re-enactment of sec. 10, 2 Rev. St. 692, all that is necessary to prove, besides the agreement claimed to constitute a conspiracy in restraint of trade, is that the parties to it had proceeded to act upon such agreement. (pp. 265, 266)

PEORIA GAS & ELECTRIC COMPANY v. PEORIA.

(26 Sup. Ct. Rep. 214, 200 U. S. 48, 50 L. ed. 365, Ill. 1906.)

Theory of Case; Offenses, Penalties; Evidence.

There were two gas companies in Peoria—the Peoria Gas Light & Coke Co., organized long prior to 1899, and the Peoria Gas & Electric Co., incorporated in 1899. After the formation of the new company and the building of its plant, the two companies entered into an agreement whereby the price of illuminating gas was raised to $1.15 and fuel gas to 75c per thousand cubic feet. The city of Peoria thereupon passed an ordinance providing that the maximum price for gas should be 75c per thousand cubic feet and that the gas to be furnished should not be less than 18 candle-power. The Peoria Gas & Electric Co. then filed a bill against the city of Peoria for an injunction claiming said ordinance invalid because it sought to establish an unremunerative rate, was in effect confiscatory, amounted to the taking of private property for the public use without just compensation, and deprived said company of its property without due process of law. The case was referred to and tried by a special commissioner, who reported that the rate prescribed by the ordinance did not furnish compensation, was confiscatory in its effect, and therefore unreasonable. On exceptions to said report the court ignored the special commissioner's findings and dismissed the bill upon the sole ground that the increase in the rates was the result of an illegal combination between the two companies. This finding had no basis in the pleadings, evidence, or commissioner's report. In reversing this judgment it was held that:

(1) It is reversible error for a court to decide a case on a different theory from the one upon which the case is tried, when such course results in injustice;

(2) When parties to an illegal agreement cease to act under it, the penalties attached to such illegal conduct also stop; and

(3) Where parties enter into an illegal combination, their continued action thereunder must be proven.

PHILLIPS v. IOLA PORTLAND CEMENT CO.

(125 Fed. 593, U. S. C. C. A., Mo. 1903.)

Contracts; Interstate Commerce; Trade Restraint.

The Iola Portland Cement Company, engaged in the manufacture of cement at Kansas, made a contract with P and others, Texas merchants, whereby the latter agreed to purchase, during a specified time, a large quantity of cement and "not to sell said cement, ship same, or allow same to be shipped," beyond the state of Texas. Having failed to carry out part of this contract, an action was brought by the manufacturer against said merchants for damages. The action was defended on the ground that the contract was a violation of the Federal anti-trust law. In affirming a judgment for the plaintiff it was held that:

(1) A contract which promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, is not in restraint of interstate commerce within the meaning of the Federal anti-trust law;

(2) The test of validity of a contract, combination or conspiracy challenged under the Federal anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states;

(3) The defense that a written contract has been changed or modified should be specially pleaded;

(4) A breach of an agreement as a defense to an action thereon must be specially pleaded;

(5) Necessary expenses incurred as a direct result of breach of a contract may be recovered as part of the damages for such breach; and

(6) Unprejudicial error is no ground for reversal.

NOTE.

A petition for a writ of certiorari was denied. 192 U. S. 606, 48 L. ed. 585, 1904.

PITTSBURG CARBON CO. v. McMILLIN.

(119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46, 1890.)

Trust Agreements; Receivership.

By a trust agreement entered into in 1887 between several manufacturing companies, and an individual, as trustee, it was agreed that each manufacturing company lease its plant and machinery to the trustee for five years, during which time the lessor should not engage in business except under the agreement; that at the trustee's request and under his control, the lessor should run the works, the trustee to pay for the material, labor, etc., and have the power to designate which factory should run and which should not and the kind of goods to be made, to fix the price of the goods to be manufactured, to designate to whom they should be sold and at what terms of sale, and to audit bills, etc.; that he should pay to each lessor an agreed sum as rent and a ratable proportion of net profits; and that he should assume the carrying out of all existing contracts between the lessors and third persons. A contract having been previously entered into by the Pittsburg Carbon Co. and the Brush Electric Light Co., for the manufacture of certain goods, its execution was assumed and carried out by the trustee. Afterwards the Pittsburg Carbon Co. refused longer to continue and be bound by the trust agreement. In an action brought against the Brush Co. by the Pittsburg Carbon Co. for the recovery of the purchase price of said goods, McMillin, who was appointed receiver in an action commenced against the trustee and the contracting corporations to dissolve said trust agreement, interpleaded, claiming the amount due as receiver of the united manufacturers. Whereupon the Brush Co. paid the money claimed by the Pittsburg Carbon Co. into court. In the

trial court this money was ordered to be paid over to the receiver. This order was affirmed by the supreme court. In affirming the latter court, it was held that:

(1) A combination, between several manufacturers, whereby their respective factories are leased to a common trustee, to be operated by them under his direction, which trustee is to designate the kind of goods to be manufactured; fix the prices at which, and indicate the persons to whom, they should be sold; purchase all materials and supplies, collect the bills and pay out of the common fund the cost of production; and divide the net proceeds and profits of the business between the several parties to the combination in the ratio fixed by the contract, is in general restraint of trade, and illegal; (119 N. Y. 50)

(2) A contract entered into in furtherance of a combination in restraint of trade is invalid and unenforcible; (p. 50) and

(3) The general rule that courts refuse to lend their aid to enforce illegal transactions at the instance of either party to the illegality is inapplicable to the receiver of an illegal combination claiming or asserting a right in favor of its creditors. (p. 52, *et seq.*)

POCAHONTAS COKE CO. v. POWHATAN COAL & COKE CO.

(60 W. Va. 508, 56 S. E. 264, 116 Am. St. Rep. 901, 10 L R A. (N. S.) 268, 1907.)

Contracts, Trade Restraint; Public Policy; Corporate Acts; Statutes; Defenses; Practice; Appeal and Error.

Various (twenty) producers and manufacturers of coke in a certain locality entered into an agreement, some of the most important features of which were: to organize a corporation to be known as Pocahontas Coke Company; for each subscriber to the capital stock of the proposed corporation to contract with it for three years for his or its sale of his or its entire coke, produced or manufactured, at a designated commission; to elect three trustees to hold the stock of each subscriber in trust during the life of the agreement; after the payment of the operating expenses of such proposed company, the surplus, if any, to be declared as annual dividends and each stockholder to have that proportion of such surplus as the number of tons of coke furnished by him or it bears to the whole number of tons of coke furnished to said company for sale; to authorize the trustees to sell to the company the shares of a stockholder who failed or refused to renew the contract for the sale of his or its entire product; and, under penalty, for a producer or manufacturer not to sell through any other agency than the Pocahontas Coke Company. After the organization of said company in accordance with the foregoing contract, each of the stockholders of said company entered into a uniform agreement for the sale of his or its entire product of coke. In a bill by the Pocahontas Coke Company against Powhatan Coal & Coke Company, both of said agreements were set forth, the bill praying for an injunction to prevent the defendant

from withdrawing from the exclusive agency contract. A preliminary injunction thereupon issued restraining the defendant from selling, through any agents or agencies other than the complainant, or in any other way, any of the coke covered by the terms of the exclusive agency contract, and from refusing to carry out said contract by withdrawing the coke aforesaid from the complainant as its selling agent, and requiring the defendant to continue to ship its coke to the order of the complainant as its sole selling agent under said contract until further order of the court. A motion to dissolve such injunction having been made and overruled, an appeal was taken. In reversing the lower court, it was held that:

(1) A contract or combination among producers and sellers of a commodity, the direct and necessary or natural effect of which is to restrain competition and control prices, and is not merely incidental, commensurate or necessary to the protection of the parties in the enjoyment of the legitimate fruits of a lawful undertaking, is void under the common law because in unreasonable restraint of trade, and against public policy; (56 S. E. 274)

(2) Where the direct and necessary or natural effect of a contract or combination is to restrain competition and control prices, to the injury of the public, when all the powers of the contract and combination shall have been exercised, the contract or combination is in unreasonable restraint of trade, and against public policy; (p. 271)

(3) "A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance when fully exercised;" (p. 271)

(4) In determining the validity of a contract under the common law, the contract, its subject-matter, the situation of the parties, and all the circumstances surrounding the transaction must be considered; (p. 269)

(5) In ascertaining the real purpose of a contract, a court is not limited to the purpose expressed in it; (p. 273)

(6) A corporation becomes a party to a contract when it is made by all of the prospective stockholders before its incorporation, which contract such corporation, when organized, is to carry out, and, after the organization of such company, does carry out; (p. 272)

(7) A contract will not be declared illegal under the Sherman anti-trust law unless such illegality clearly appears; (p. 268)

(8) It is no defense to the illegality of a contract or combination to show that in the particular case a complete monopoly has not been formed, or that no control of prices has been exercised, or that prices have been lowered and not raised; (p. 271)

(9) A contract in unreasonable restraint of trade is unenforcible in equity; (p. 274)

(10) When a motion is made upon a bill without an answer, the motion should be determined alone from the allegations of the bill, taking them as true; (p. 268)

(11) A mandatory injunction granted without notice is void; (p. 274) and

(12) Improperly admitted facts will be disregarded upon the consideration of the case on appeal. (p. 268)

POST v. SOUTHERN RAILWAY CO.

(103 Tenn. 184, 52 S. W. 301, 1899.)

Carriers.

Several shippers brought a bill in chancery, in a state court, against the Southern Railway Company, to compel it by mandatory injunction to issue its bills of lading for goods tendered to it for transportation to certain points, with the routing, or lines of connecting carriers, selected by them. The principal question involved in this case was whether the shipper or the carrier had the right to designate the route of through shipments at a reduced through rate. The question whether a certain declaration of policy made at a meeting by several railroads constituted a violation of the Federal anti-trust law was conceded to be beyond the jurisdiction of the court.

PURINGTON v. HINCHLIFF.

(219 Ill. 159, 1905.)

Conspiracy; Damages.

Some of the members of voluntary associations hereinafter mentioned and the Chicago Masons' and Builders' Association (a corporation) were sued in an action on the case for damages to a manufacturer of and dealer in bricks. The action was founded on a conspiracy between three organizations—one of them, a corporation, controlling ninety-five per cent of the brick construction and masonry work in Cook county, the other, a voluntary organization, comprising ninety-five per cent of brick manufacturers in said county, and the third, also a voluntary association, composing about ninety-eight per cent of competent bricklayers in said county. These organizations made it impossible for a person not a member of the Chicago Masons and Builders' Association to purchase brick from any of the members of Brick Manufacturers' Association of Chicago; and the members of the Bricklayers' Union refused to lay brick manufactured by persons not members of either of said associations. It was shown that the defendant members of these associations interfered with, in various ways, and made it impossible for the plaintiff to conduct his business. Judgment was rendered in the plaintiff's favor. This was affirmed by the appellate court. On review it was held that:

(1) Any obstruction of, or interference with, the conduct of another's lawful business, caused by a combination of persons, corporations, or associations, whether by direct or indirect means, is an unlawful conspiracy; and

(2) All parties to a conspiracy to ruin the business of another are liable for all overt acts done pursuant to such conspiracy and for the resultant loss, whether they were active participants or not.

QUEEN INSURANCE CO. v. STATE.

(86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, 1893.)

Insurance Combinations; Statutes; Construction; Constitutional Question, Practice.

In a petition on behalf of the state against fifty-four foreign insurance companies, the Queen Insurance Company, and the Texas Insurance Club, it was charged that the club was created for the purpose of fixing a uniform rate of insurance throughout the state upon a graduated scale, thereby preventing competition among said companies, and of establishing a fixed rate of commission to be paid to the agents of such companies; which was claimed to be contrary to the provisions of 1889 anti-trust law, in restraint of trade, and against public policy. The petition prayed that the club be dissolved and that the permits to the foreign insurance companies be canceled, or that they be enjoined from carrying out the objects of said combination. The trial court sustained a demurrer to the petition on the ground that the statute was unconstitutional, but granted the prayer for an injunction. The court of civil appeals affirmed this judgment. In reversing both courts it was held that:

(1) A combination of fire insurance companies to establish uniform rates of insurance and agents' commissions throughout the state is not within a statutory provision prohibiting restrictions in trade, the production, price, or rates of transportation of commodities or articles of commerce;

(2) The phrase "restrictions in trade" used in section 1, Act 1889, embraces the buying and selling of any article of commerce, the barter of such articles, and their transportation by common carriers, but does not include the business

of insurance, which is a trade only in the sense that it is an occupation or employment; (86 Tex. 265)

(3) "Ordinarily the word 'trade' is employed in three different senses; first, in that of the business of buying and selling; second, in that of an occupation generally; and third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts;" (p. 263)

(4) A contract, or the business, of insurance is not commerce; (p. 265)

(5) The word "commodity" is ordinarily used in the commercial sense of any movable and tangible thing that is produced or used as the subject of barter or sale; (p. 265)

(6) "Insurance is a mere contract of indemnity against a contingent loss;" (p. 270)

(7) When a statute contains words having different meanings, one being more limited than another, it is not obligatory upon a court to construe such words in the more comprehensive sense, although it is required to construe an act "according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects;" (p. 264)

(8) In construing a statute of doubtful meaning, the legislative intent must be sought, and, when discovered, must govern; (p. 264)

(9) In discovering the intention of the legislature when construing a statute of doubtful import, it is proper to look to the consequences of any particular interpretation, and if they be found unreasonable or oppressive, such interpretation ought to be rejected; (p. 264) and

(10) "The decision of a grave constitutional question, although involved in a case, is properly pretermitted until a controversy arises in which such decision becomes necessary to its disposition." (p. 268)

RICHMOND et al. v. DUBUQUE & SIOUX CITY RAILROAD CO.

(26 Ia. 191, 1868.)

Contracts.

In this case an action was brought to recover damages for failure to permit plaintiffs to handle grain according to stipulations of certain contracts. The case involves solely the construction of said contracts, giving to an elevator company an exclusive right to handle at a certain point through freight of a railroad company.

It was held that in case of doubt, a contract will not be declared as creating a monopoly and to be therefore void as against public policy.

RICE v. STANDARD OIL CO.

(134 Fed. 464, U. S. C. C., N. J. 1905.)

Statutes; Pleading; Practice.

The declaration in this case substantially alleged that the plaintiff was a refiner of crude petroleum and manufacturer of the refined products of crude petroleum from 1876 to 1904; that he was engaged in trade and commerce among the several states of the United States, selling and shipping said manufactured products to various customers residing in the United States; that his contracts with such customers yielded him a profit of about $50,000 per annum; that he was possessed of a plant, refinery and business valued at a stated amount; that on the 2d of January, 1882, certain named individuals, firms and corporations, his competitors, were in competition among themselves; that thereafter these individuals, firms and corporations entered into a contract to put an end to competition and to injure and destroy his business and the business of others engaged in the same line throughout the United States, and to drive him and others out of competition with them, and unlawfully secure for themselves the customers who theretofore had traded or might thereafter trade with him and others; that on January 4, 1882, said individuals, etc., entered into a supplemental contract; that August 1, 1882, in pursuance of these two contracts, and as a part of the scheme of said individuals, etc., the Standard Oil Company was incorporated in New Jersey, with a capital of $3,000,000, under the name of the "Standard Oil Company of New Jersey;" that on June 14, 1899, the name of the company was changed to "Standard Oil Company," and its capital stock increased to $110,000,000; and that said Standard Oil Company, from the date of

its incorporation down to the time of the commencement of the suit, joined and co-operated with the several individuals, firms and corporations mentioned in the two contracts in a general plan or scheme to destroy his business, to render his plant worthless, to secure for themselves his customers, and to destroy competition and create a monopoly. In granting a motion to strike out the plaintiff's declaration on the ground that it was irregular and defective, it was held that:

(1) The Federal anti-trust law has created only two distinct offenses—contracts in restraint of trade, and combinations or conspiracies in restraint of trade;

(2) Two or more distinct offenses should not be alleged in a single count, whether in a civil action or criminal prosecution, and, if so alleged, the pleading is objectionable on the ground of duplicity;

(3) A single count in a declaration, under the Federal anti-trust law, charging the making of an unlawful contract, as well as the forming of an unlawful combination or conspiracy, is irregular and defective for duplicity;

(4) A declaration under section 7 of the Federal anti-trust law must state facts showing that by reason of the unlawful contract or combination the plaintiff has been injured in his business or property;

(5) A declaration alleging a combination and conspiracy in restraint of trade must state when the combination or conspiracy was formed, how, by whom, and for what purposes;

(6) A defendant will not be required to plead to general and defective averments; and

(7) Under section 110 of the New Jersey practice act (Laws 1903, p. 569) a declaration which is faulty on account of duplicity, indefiniteness, and uncertainty, may be stricken out on defendant's motion.

RICHARDSON v. BUHL et al.

(77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457, 1889.)

Contracts; Public Policy; Practice, Courts.

B, in 1879, became security for R on a certain bond and indorser on some of his paper in a large amount, taking as collateral security one thousand eight hundred out of three thousand shares of the stock of the Richardson Match Company, a Michigan corporation, organized for and conducting a match business at Detroit. With the assignment of this stock R gave B authority to vote it at stockholders' meetings, and to receive and retain a certain proportion of dividends which might be declared on it. After this transaction was consummated, A became a director and president of the Richardson Match Company, and B, his two sons, and R were the only other officers and directors of said company. In 1880 the Diamond Match Company was organized under Connecticut laws, for the purpose of uniting all of the match manufactories in the United States, with the object of monopolizing and controlling the business of making friction matches in the country. This purpose was afterwards effected by buying up many established plants engaged in said business and buying off plants that were preparing to enter into such business, taking bonds from the owners and manufacturers that they would not engage in the business themselves, or indirectly through others, for ten or more years thereafter. Appraisements of these properties were made, and the properties were paid for with the common and preferred stock of the purchasing corporation. By this method, and through the activity of its officers, the Diamond Match Company secured control, substantially, of all the match factories in the country, with their several prop-

erties, and the owners thereof were brought under its dictation, and the great monopoly became complete. Among the factories first to pass under the control of the Diamond Match Company at the time of its organization was that of the Richardson Match Company. Under several agreements between R, B and A a certain original agreement of R and B was substituted and its performance extended, a large amount of money was loaned to R, the exchange of R's stock in the Richardson Match Company for the stock of the Diamond Match Company was agreed upon, and B and A were authorized to sell R's stock, as exchanged, whenever it became necessary, to fully satisfy his indebtedness. The exchange of the stock was made accordingly. Thereafter all of R's indebtedness to B and A was paid from dividends earned and received on such stock. Claiming a large amount due him under these contracts from B and A, and fearing that they would exercise the right to sell said stock under said contract by virtue of a counterclaim, R brought a bill to enjoin such sale and to have said stock retransferred to him, and for an accounting. At the circuit the complainant obtained a decree in his favor. In reversing this decree and dismissing the bill it was held that:

(1) A corporation organized for the purpose of obtaining control of an entire industry in order to create a monopoly therein is against public policy;

(2) Contracts made in furtherance of a combination in general restraint of trade are unenforcible;

(3) "Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication;"

(4) When a contract is brought before a court for construction and adjudication, its validity is necessarily involved; and

(5) A court of equity will leave parties in *pari delicto* where it finds them.

RUBBER TIRE WHEEL CO. v. MILWAUKEE RUBBER WORKS CO.

(142 Fed. 531, U. S. C. C., Wis. 1906.)

Patents; Licensee's Contract.

This case was reversed by the court of appeals; see next page. When before the circuit court, it was held that:

(1) During the life of a patent and while the title to the patented article is in the patentee, licensee, or assignee, each has an absolute monopoly of the same and may do with it as he pleases; but once the title to the patented article passes from its first owner, the force of the patent monopoly is spent, and such article is subject to the same laws as any unpatented article;

(2) The particular contracts involved in this case went beyond the patentee's right to the full enjoyment of his patent monopoly and directly and substantially restrained interstate commerce; and

(3) Declaring a patent invalid by one of the United States circuit courts of appeals affects such patent only in the jurisdiction of such court, and does not limit the rights under the same patent in other jurisdictions.

RUBBER TIRE WHEEL CO. v. MILWAUKEE RUBBER WORKS CO.

(39 Chi. Leg. N. 358, 154 Fed. 358, U. S. C. C. A., Wis. 1907.)

Patent Monopoly; Sherman Act, Violation, Test; Anti-Trust Laws; Contracts; Infringement.

Prior to the execution of the contracts hereinafter mentioned, the plaintiff was the assignee of a patent, the validity of which was sustained by three United States circuit courts of different districts, and by the Court of Appeals for the Republic of France. This patent had been declared invalid by a Court of Appeals of the United States, the Supreme Court declining to take the case on *certiorari*. By reason of the unfavorable decision on said patent, all except two of the manufacturers who became parties to said contracts, disregarded and infringed upon the patent and cut prices. Whereupon the assignee of said patent and eighteen manufacturing companies entered into three separate contracts, constituting one license system, whereby these companies were given the right to make use of and sell the patented articles for one year, and it was agreed that each company's share of trade should be a certain proportion of the whole; that the patented articles should be sold at certain prices according to quality; that each company licensee pay the licensor each month a certain percentage upon such company's sales and an additional royalty of twenty per cent of the amount over its quota; that the licensor should employ a commission of five persons to supervise the transactions of all the parties and receive all royalties in excess of two per cent; that from the money thus gathered by the commission it should pay monthly to any licensee that sold less than its quota of the preceding month's total business a sum equal to twenty per cent

of such deficiency, after deducting the commissioners' salary and expenses; that the commission should accumulate $50,000 and distribute any sums in excess monthly among the licensees according to their quotas of trade, and at the expiration of the arrangement to distribute all funds on hand; and that the commission should have power, upon written consent of the majority of the parties in interest, to purchase with the funds in its possession the patented articles from any or all of the parties to the agreements, at the stipulated prices, and to dispose of such articles to the trade at such prices as it should deem it for the best interests of all. In an action against one of the licensee companies to recover royalties, it was claimed that the foregoing arrangement was in violation of the Sherman Act and also of the anti-trust law of Wisconsin. A jury having been waived, the court found for the defendant on the ground that the contracts constituted an illegal combination under the laws of the United States, and were illegal and void. In reversing this judgment, with directions to enter judgment in plaintiff's favor, it was held that:

(1) By virtue of the Federal patent laws, a patentee has an absolute monopoly to make, vend, and use the patented article, including the right to exclude from, or grant the use of, his invention upon such terms as he sees fit to make, the only limitation upon such right being that of time;

(2) An agreement or combination between the licensor and licensees of a patent to pool profits and control prices of a patented article is not invalid under the Sherman Act;

(3) A requirement in a license contract that the licensee should join other licensees in a combination or pool to control the prices and output of the patented article is not invalid under the Sherman Act;

(4) Patented articles (while in the hands of the patentee or licensee) are not articles of trade or commerce among the several states within the meaning of section 1, Sherman Act;

(5) The true test of a violation of the Sherman Act is the in-

jury to the public by depriving it of something to which it has a right;

(6) The monopoly granted by the Federal laws to patentees is not affected by state anti-trust laws;

(7) A provision void for being against public policy, if separable, will not affect the valid provisions of the same contract; and

(8) An infringement suit not being a proceeding *in rem*, an adjudication invalidating a patent, does not affect the validity of the patent, except as to the parties to such suit.

NOTE.

In a concurring opinion, Grosscup, J., held that proposition (4) was not necessary to a decision of the case.

RUNCK v. CLOUD.

(8 Ohio N. P. 436, Super. Ct. Cin. 1901.)

Restraint of Trade, Conspiracy; Actions; Statutes, Construction.

The Cincinnati Underwriters' Association, an unincorporated company, was composed of individuals and firms who were acting as insurance agents, brokers and solicitors, and some of whom were representing foreign insurance companies licensed to do business in Ohio. While the expressed purpose of the association was "the promotion of harmony and correct practice and general improvement and elevation of the business of fire and tornado insurance," the real object of the association was to fix and maintain insurance rates and to prevent competition. The latter object was accomplished under a constitution, by-laws and rules requiring the association's secretary to fix uniform rates of insurance for the various risks, which rates were to be observed by all the members, and compelling the members not to deal with non-members, subjecting the offender to a graduated penalty, culminating in his expulsion from membership in the association. R., being an insurance agent, and having an established business in Ohio, found it impossible to conduct his business as an independent agent by reason of threatened enforcement of the various rules of said association against him. He thereupon brought an action against some of the members of said association, seeking to recover damages, and to enjoin them from doing the various alleged unlawful acts. In finding for the defendants it was held that:

(1) An association or combination between insurance agents, brokers and solicitors to fix insurance rates, thereby restricting competition is not, in the absence of proof showing

a perversion of the purposes of such a combination, a conspiracy unlawful in the sense of positive, affirmative illegality, such as will justify any person outside of said combination in predicating thereon a liability to him for the operation thereof; (pp. 442, 445½)

(2) At common law an action for conspiracy is maintainable at law only when its object or the means adopted for its accomplishment is unlawful, and results in actual or reasonably apprehended injury to the plaintiff; (p. 440½)

(3) At common law, contracts in restraint of trade are not illegal, but merely void and unenforcible; (pp. 442, 443)

(4) "A conspiracy is a combination between two or more persons to do an unlawful act or to do a lawful act by unlawful means;" (p. 440½)

(5) The legality of an object, or of the means used in accomplishing it, is determinable regardless of the intent with which it is performed; (p. 440, *et seq.*)

(6) Whether a particular act is or is not "malicious" is determinable by whether it is a natural incident or outgrowth of some existing relation, for every person is presumed to intend the natural and probable consequences of his own acts; (pp. 441, 442)

(7) None of the terms "trade," "commerce," "commodity," "restriction in" or "restraint of trade," and "trust" in the body of the anti-trust act of 1898 embraces the business of insurance, although the title of said act contains the clause "all classes of business in the state;" (p. 445½, *et seq.*)

(8) Courts of one state will adopt the construction placed upon an act by the highest judicial tribunal of another state prior to the enactment of a similar act; (pp. 448, 449)

(9) The title of an act, being no part of the act itself, may sometimes be used as an aid in the construction of the act to remove ambiguities, but in case of niceties and doubt it should not be relied on; (p. 449)

(10) Section 3659, Revised Statute, prohibiting foreign insurance companies from entering into any compact or combination with other insurance companies to control rates, does not cover combinations of insurance agents; (p. 449) and

(11) Penal statutes are construed strictly, and their provisions will not be extended either as to persons or remedy. (p. 449½)

NOTE.

A very interesting case involving a discussion upon conspiracy and malice is State v. Huegin, 110 Wis. 189 (1901). The judgment in this case, however, is based upon a special statute against boycotts, etc., and constructive malice.

SAN ANTONIO GAS CO. v. STATE.

(22 Tex. Civ. App. 118, 54 S. W. 289, 1899.)

Statutes; Quo Warranto; Receivership; Pleading; Evidence, Conspiracy.

In January, 1899, K owned and controlled a large majority of the stock of the San Antonio Gas Company, a Texas corporation, of which he was president. At that time W was the owner of all the stock of the Mutual Electric Light Company, the San Antonio Street Railway Company and the San Antonio Edison Company, all Texas corporations, of which he was president. These were the only corporations manufacturing electricity and gas in San Antonio at that time. Pursuant to an arrangement for the consolidation of all the interests in the four companies, so that the production and price of electricity and gas might be controlled and the interests of all the corporations might be pooled, T, a New York promoter, during January, 1899, procured options from K and W on the shares of stock owned by them in their respective companies, both options maturing on the same day. In furtherance of the same combination an ordinance was obtained from the city of San Antonio extending the franchises of the four companies until July 1, 1940. After the passage of this ordinance three of these four companies ceased bidding for the lighting of the city, thereby enabling one of these companies, the Mutual Electric Light Company, to obtain a five-year contract for said lighting. In an information presented March 16, 1899, on behalf of the state, the foregoing facts, among others, were alleged, and a forfeiture of the charter of the San Antonio Gas Company was sought. After trial, a judgment of forfeiture of the San Antonio Gas Company's charter was rendered and

a receiver appointed to take charge of the property of said corporation. In affirming this judgment it was held that:

(1) An arrangement between all of the electric light and gas manufacturers of a city whereby their entire businesses are placed under one management, contracts for public lighting are to be divided among them, and all competitive bidding thereon suppressed, is in violation of 1889 anti-trust law (art. 5313, Sayles' Civ. Stats.);

(2) A combination in restraint of trade, and which creates a monopoly, is unlawful, regardless of the motive actuating the parties in creating it, or its immediate result upon trade;

(3) 1899 anti-trust law (art. 5313, Sayles' Civ. Stats.) is constitutional;

(4) A state, in a proper proceeding, may forfeit the charter of a corporation which has violated the law by entering into a combination in restraint of trade;

(5) Upon forfeiture of a corporation's charter, a court may, under article 1465, Sayles' Civ. Stats., appoint a receiver, although no application is made for such appointment by any person interested in the property of the corporation;

(6) Every circumstance which tends to cast light upon a transaction claimed to constitute a conspiracy is admissible, because "conspiracies, being in defiance of law, are conceived in secrecy and executed in such a manner as to avoid detection and exposure, and proof of such unlawful enterprises must, in the very nature of things, be made by circumstances;" and

(7) When the testimony establishes a conspiracy, the acts and declarations of a co-conspirator, although not mentioned in the pleadings, made in furtherance of the common design, are admissible against all of the conspirators.

SANFORD et al v. PEOPLE.

(121 Ill. App. 619, 1905.)

Conspiracy; Statutes.

The Retail Coal Dealers' Association of Illinois and Wisconsin, unincorporated, was organized in 1901, for the purpose of protecting "its members against the shipment of coal direct to consumers or scalpers, by mine operators, wholesale shippers, jobbers, or other agents, and the general improvement and elevation of the coal trade." No one was entitled to regular membership in this association unless he possessed a certain amount of capital, owned or leased a coal yard, kept a set of scales, and an office open continuously during business hours, and had storage capacity for one or more cars of coal, etc. Mine operators, wholesale shippers and jobbers were permitted to become honorary members of this association, and were encouraged in so doing by requiring all regular members to deal with them exclusively. Any honorary member who sold coal to any person not a regular dealer was required to pay a certain penalty; and when he made a sale to a consumer in any town where there was a regular member of the association, the honorary member or wholesaler *ipso facto* withdrew from the association and lost all the trade of the regular members. Complaints of all kinds were investigated and decided by an executive board which had power to suspend or expel any member without appeal. In 1903 the officers of said association were indicted for a conspiracy to do an illegal act injurious to public trade, etc., the indictment containing eight counts. After a motion to quash the indictment was overruled, the defendants pleaded not guilty. Upon a trial by a jury the defendants were found guilty and fined. The case thereupon came up before the appellate

court on writ of error and an agreed statement of facts. In affirming the judgment of the lower court, it was held that:

(1) A combination between retail and wholesale dealers in a commodity, the tendency and manifest purpose of which are to prevent general competition so as to enable its members to control prices, is an act inimical to trade and commerce and detrimental to the public, amounts to a conspiracy, and is indictable regardless of what may be done in furtherance thereof;

(2) Common law offenses in relation to the regulation and fixing of prices and conspiring to do acts injurious to the public trade are not abolished by the anti-trust law of 1891; and

(3) The anti-trust law of 1891 does not repeal the general criminal conspiracy statute, inasmuch as it provides for the punishment of parties who conspire to do an illegal act injurious to the public trade.

NOTE.

While the foregoing judgment was apparently based upon common law as well as statutory conspiracy in restraint of trade, the judgment is justifiable only upon the latter ground.

SANTA CLARA VALLEY MILL & LUMBER CO. v. HAYES et al.

(76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211, 1888.)

Restraint of Trade, Contracts; Actions.

The lumber company entered upon a scheme to limit production in the supply of lumber in a number of counties, by leasing lumber mills, shutting them down, and entering into certain restrictive contracts where leases of mills could not be obtained. The contracts executed as part of this scheme provided for the delivery of a certain quantity of lumber during a certain period, and for a penalty in case lumber should be manufactured for or sold to third persons during such period within designated territory. H and others having entered into a contract of this character and having broken the same, an action was commenced against them to recover a large sum of money as damages. The trial court found and rendered judgment against the legality of said contract. In affirming this judgment it was held that:

(1) A contract entered into with the object of suppressing the supply and enhancing the price of a commodity is void as against public policy; (76 Cal. 392)

(2) Where the illegality inheres in the entire consideration, a contract is indivisible; (p. 393)

(3) Illegal contracts are absolutely void, and are enforceible neither in equity nor at law. (p. 390)

SKRAINKA v. SCHARRINGHAUSEN.

(8 Mo. App. 522, 1880.)

Trade Restraint; Contracts.

This was an action for a penalty under a contract made in 1878 by twenty-four owners and operators of stone quarries in or near St. Louis, Missouri. The contract was entered into for the express purpose of securing to the contracting parties fair profits in their business and to avoid ruinous competition among themselves. The main features of said contract were: (a) The appointment of an exclusive agent to sell on account of each contracting party his proportionate share of building stone at fixed uniform prices within designated territory; (b) the appointment of an executive supervisory committee to determine upon a scale of prices for stone, settle complaints, and see that the common agent dealt fairly with each party to the contract; and (c) fixing a penalty of $100 as liquidated damages for violation of the agreement. This contract was to operate for six months from its date. One of the parties to said contract was authorized to sue for the penalties, which, when recovered, were to be divided in a certain manner among the parties to the agreement. A breach of this contract by one of the contracting parties having occurred, he was sued before a justice of the peace for said penalty. The justice gave judgment for the plaintiff. On appeal to the circuit court this judgment was affirmed. On a further appeal to the appellate court the judgment was again affirmed, the reviewing court holding that:

(1) An agreement between a number less than all the owners and operators of quarries of one city, which is lim-

ited as to time and place, does not deprive men of employment, unduly raise prices, cause a monopoly, or suppress competition, is not in general restraint of trade;

(2) Not every agreement in restraint of trade is illegal;

(3) A contract is in restraint of trade and against public policy when it injures the contracting parties by diminishing their means of supporting their families, tends to deprive the public of the services of useful men, discourages industry, diminishes production, prevents competition, and enhances prices. But where the restraint is partial and the restriction reasonable and such as affords a fair protection to those in whose favor it operates, and is not so extensive as to interfere with the interests of the general public, it is not illegal as against public policy; and

(4) Under Missouri practice it is unnecessary, except in cases arising by virtue of the Landlord and Tenant Act, that the papers on appeal from a justice of the peace should show that he was holding court within the district for which he was elected.

NOTE.

Although this case announces correct rules by which contracts or combinations may be tested with reference to their being or not being in restraint of trade, the court fails to make a correct application of such rules to the case before it. The Slaughter Case arrives at a directly opposite conclusion to the one reached in the Skrainka Case.

SLAUGHTER v. THACKER COAL & COKE CO.

(55 W. Va. 642, 47 S. E. 247, 65 L. R. A. 342, 1904.)

Trade Restraint; Contracts.

Three out of four mining companies in a West Virginia district organized another West Virginia company for the sole purpose of acting as sales agent for the operating companies. Immediately after the incorporation of the agent company a contract was entered into between it and each of the three operating companies (only one of these contracts being involved in this case, but the existence of the other contracts was shown at the trial) whereby the agent company, in consideration of ten per per cent per ton of coal profit, agreed to sell for five years for each mining company a fixed quantity of coal, or, in default of selling said quantity, to pay twenty per cent per ton to the mining company for unsold coal. Each mining company agreed to furnish said agent company with a designated maximum quantity of coal a year and further agreed to pay ten per cent liquidated damages in case it failed to deliver such coal as ordered by the agent company. The agreement also provided for the establishment and maintenance of retail prices at which the agent company should sell the coal thus obtained. When this contract had been in force over a year one of the parties to it refused to be further bound by it. A dissolution and winding up of the affairs of the agent corporation soon followed. Subsequently the receiver, appointed in the proceeding to dissolve the agent company, brought an action for damages against the mining company which broke said contract. In the court below judgment was rendered in defendant's favor. This was affirmed on appeal, the court holding that:

(1) A contract entered into by nearly all of the independent producers of a district and a corporation organized by them, whereby such corporation is to sell the entire product of these producers at uniform prices fixed by them is in restraint of trade;

(2) The test of illegality of a combination is its injury to the public by either actually controlling, or having a tendency to control, prices, limit production, or suppress competition in such a way as to restrain trade and create a monopoly, regardless of the intention of the parties participating in such combination or the temporary effect such combination has upon prices; and

(3) Where the sole object of all the parties to a contract is to restrain competition and enhance or maintain prices, the contract is in restraint of trade.

NOTE.

Two important and prominent facts to be considered in this case are these: (a) The mining companies attempted in the contract held illegal to fix prices at which the selling company was to sell the coal on the market; and (b) the selling company was not in reality an independent company. It was organized by the operating companies, which held nearly all of its stock.

SMILEY v. KANSAS.

(196 U. S. 447, 49 L. ed. 546, Kan. 1905.)

Police Power; Statute, Construction; Appeal and Error.

S was secretary of the Kansas State Grain Dealers' Association. While in Bison on some business he induced all the dealers in wheat at that place, four in number, who were competitors in the purchase of grain, to enter into an arrangement whereby, if one bought and shipped more grain than the others, he had to pay them a certain per cent. As security for such agreement each of the parties deposited his check for $100 with S. Each made to S weekly reports of his grain purchase. If one had purchased more than his share he had to pay S three cents per bushel for the excess, which amount was subsequently divided among the other dealers. For being a party to this arrangement S was indicted, convicted and sentenced to pay a fine of $500 and to imprisonment in the county jail for three months. On appeal to the state supreme court the judgment was affirmed. On writ of error from the United States supreme court it was held that, in affirmance of said judgment, that:

(1) A secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power of a state extends;

(2) The scope and meaning of a state statute as determined by the highest court of the state is conclusive on the Federal courts in the determination whether or not such statute violates the Federal constitution; and

(3) On writ of error from the United States supreme court to a state court of last resort, all questions of fact are considered settled by the jury's verdict.

SOUTHERN ELECTRIC SECURITIES CO. et al. v. STATE.

(— Miss. —, 44 So. 785, 1907.)

Corporate Stock Ownership; Foreign Corporations; Injunction.

In 1901, there were in Natchez, Mississippi, two companies, the Natchez Gaslight & Power Co., engaged in the manufacture and sale of illuminating gas, and the Natchez Light, Power & Traction Co., engaged in the manufacture and sale of electricity for light and power purposes. At that time there was, also, in said city, a street railway company, known as the Natchez Electric Street Railway & Power Co. In 1902, by various intermediate conveyances, these three corporations were merged into the Southern Light & Traction Co., a Mississippi corporation, which thereafter owned and operated a street railroad and gas and electric light properties in Natchez, Mississippi. About the same time the Vicksburg Railway & Light Co., also a Mississippi corporation, owned and operated a street railway and electric light plant in Vicksburg, Mississippi. The Beaumont Traction Co. and the Jennings Co. owned and operated similar properties in Beaumont, Texas, and Jennings, Louisiana. In 1903, a number of individuals owning a majority of the capital stock in, and bonds of these corporations, agreed to organize a securities holding company under the laws of New Jersey, to which company all of the stocks and securities in said last mentioned companies were to be turned over in consideration of the receipt of a certain proportion of the stock in, and bonds of the new company. Pursuant to this agreement the Southern Electric Securities Co. was organized, to which company a majority of the capital stock in the four corporations was transferred, said company thereby becoming the owner of about three-fourths of the capital stock of the Vicksburg Railway

& Light Co., and of the Southern Light & Traction Co., besides some of the bonds of both companies. Subsequently, the Interstate Trust & Banking Co., a Louisiana corporation, acquired a large portion of the capital stock of the New Jersey company, many of the officers, agents, and representatives of the latter company being also officers, etc., of the former corporation. In a bill by the state of Mississippi, upon the relation of the district attorney, against the Southern Electric Securities Co., the Interstate Trust & Banking Co., and a number of individuals, some of the foregoing facts were alleged and it was sought to enjoin the Southern Electric Securities Co. from voting in the stockholders' meeting of the Vicksburg Railway & Light Co., and from controlling, operating, managing or reorganizing said railway company in any manner for the reason that said Southern Electric Securities Co. was an illegal trust, and was exercising its corporate powers in the state in violation of its statutes and policy. The defendants answered admitting the various allegations of the bill, but contended that the contract in question was made in Louisiana, in which state it was valid; that the laws of Mississippi could not have extraterritorial effect; that under the laws of New Jersey, and the charter of the Southern Electric Securities Co., said company had corporate authority to acquire, etc., and vote stock of the other corporations; that the purchase of the stock by said company of the Mississippi companies was made in New Jersey, where the purchase was valid; that the anti-trust laws of Mississippi could not be given an extraterritorial effect; and denied unlawful confederation or combination. An injunction having been issued, a motion was made to dissolve the same. After hearing the evidence this motion was denied. In affirming the order or decree denying the motion to dissolve, it was held that:

(1) A foreign corporation organized for the purpose of holding the capital stock of competing domestic companies in

order to control their management, and thereby prevent competition between them, is an unlawful trust or combination within the meaning of the Mississippi anti-trust laws, although the laws of the state under which the corporation is organized permits corporate stock ownership;

(2) A state may proceed against any single corporation organized under its laws when the corporation exceeds its charter rights or violates the public policy of the state, or the state may pass over such corporation and proceed against a dominating corporation, domestic or foreign, attempting in any way to prosecute the business which the subordinate corporation could not; (44 So. 790)

(3) When a corporation enters into a combination with others for the purpose of creating a monopoly or trust, the corporation is subject to attack upon the ground that it violates its charter or some principle of the law of its creation; (p. 789½)

(4) Where the exercise by a foreign corporation of a corporate act within the state is against public policy, such corporation may be enjoined from performing such act; (p.791)

(5) Any substantial control or management of a domestic corporation by a foreign company organized specially for the purpose, such as the voting of stock, constitutes such transaction of business within the state as to confer jurisdiction upon the court to enjoin the same; (p. 791)

(6) In determining whether a foreign corporation can perform a corporate function in the state, a court, under an averment that such corporation constitutes an illegal trust or combination, may look through the various steps leading up to the organization of the company, to discover the reason of its organization, the purposes for which it was organized, and whether or not these purposes are illegal; (p. 789½) and

(7) Whenever, through the action of stockholders, the franchises of a corporation are abandoned and its property is transferred to another corporation for an unlawful purpose, the acts of the stockholders are deemed those of the corporation. (p. 790)

STANDARD OIL CO. et al. v. DOYLE.

(118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331, 1904.)

Conspiracy, Damages; Pleading; Practice, Evidence; Appeal and Error.

In this case the petition substantially alleged that in 1901, in the city of Lexington, Ky., C. B. Gilman and M. F. Griffith, composing the firm of Brilliant Light Oil Co. and the Standard Oil Co., a corporation, maliciously, unlawfully and wickedly conspired, combined, confederated and agreed together between and among themselves to estrange and alienate the acquaintances, customers, and patrons of plaintiff, to ruin, oppress and impoverish him, and drive him out of the business of selling and contracting for the sale of oils, etc., and to deprive him of all benefit and profit under a certain contract; that such conspiracy was accomplished by wanton and malicious interference with plaintiff's business and the conduct thereof, by obstructing, harassing, and annoying plaintiff's employes while engaged in the discharge of their respective duties and willfully enticing, pursuing, and otherwise influencing such employes to leave plaintiff's employ against the will and consent of plaintiff, by threatening certain wholesale customers of plaintiff to shut them up in their business if they continued to purchase and deal in plaintiff's oils, etc., by threatening both wholesale and retail customers of plaintiff with the refusal of said Standard Oil Co. to sell them oil, etc., as long as they continued to purchase such articles, or any of them from plaintiff, by causing and procuring false and injurious reports concerning plaintiff and his business to be circulated in and about said city, by causing and procuring plaintiff's arrest on various charges of violating the ordinances of said city and the criminal and penal laws of the city of

Lexington and commonwealth of Kentucky and his prosecution therefor; that each and all of the wrongful acts were done in pursuance of the conspiracy alleged as existing between and among the several defendants, and that by reason of such conspiracy, and of the commission of the named wrongful acts in furtherance and execution thereof, plaintiff had been forced to give up and quit the business of buying and selling oils, etc., in the city of Lexington and vicinity, and had been deprived of the opportunity to earn a livelihood for himself and family, at his own home in the business and vocation of his life, which he had been pursuing for many years and for which, from his long experience therewith and his extensive and favorable acquaintance, he was thoroughly fitted. Upon overruling a demurrer to this petition there was a trial by jury, resulting in a verdict and judgment against the Standard Oil Co. for $2,300 damages and against Gilman for $300 damages. In affirming this judgment it was held that:

(1) Whether a conspiracy formed for the purpose of injuring or driving one out of business be lawful or unlawful so far as the purpose is concerned, where unlawful means are used in effectuating that purpose, the conspiracy becomes actionable and any loss or damage suffered in consequence may be recovered; (118 Ky. 670)

(2) One may, by fair methods, compete with a rival until by shear force of competition, by underselling or outbidding him, his own business is built up to the detriment and ruin of his rival, the damage in such case being, in the eye of the law, *damnum absque injuria*. Where, however, one seeks not only to build up his own business at the expense of a rival's but to impair, and if possible, destroy that rival's business by the use of unlawful means, damages may be recovered against him in so far as it works loss and damage to his rival; (p. 670)

(3) Malice and bad motive alone do not constitute a cause of action for civil conspiracy; (p. 670)

(4) A conspiracy is a combination between two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means; (p. 678)

(5) In an action for damages caused by a conspiracy in restraint of trade, a petition substantially charging the defendants with obstructing, harassing and annoying plaintiff's employes while engaged in the discharge of their business duties, threatening customers of plaintiff to shut them up in their business if they continued to deal with plaintiff, causing and procuring the circulation of false and injurious reports concerning plaintiff and his business in plaintiff's business vicinity, and procuring plaintiff's arrest and prosecution on false charges in connection with his business for the purpose of estranging and alienating the acquaintances of plaintiff's customers and patrons, sufficiently describes the means used to effectuate a conspiracy and shows such means to be unlawful; (pp. 671, 672)

(6) A peremptory instruction at the close of all the evidence should not be given when the evidence is conflicting upon all the questions at issue and there exists sufficient evidence upon an important issue to authorize a submission of it to the jury; (p. 672, *et seq.*)

(7) A conspiracy being once established, or facts having been adduced justifying the inference of a conspiracy, the acts and declarations of each conspirator made pursuant to and in furtherance of the conspiracy are competent evidence against all, it being immaterial when one enters into or becomes a party to the conspiracy and how prominent or inconspicuous a part he may take in the execution of the unlawful purpose or the use of the unlawful means, every conspirator being responsible to the fullest extent for all that precedes as well as all that follows in connection with the plot, whether done by himself or by one or more of his associates, except that what is said and done must be said and done after the formation of the conspiracy, and in furtherance and in pursuance thereof; (p. 678)

(8) Section 583, Civil Code, requiring that the officer taking

depositions shall deliver them to the clerk of the court in which the action is pending, or send them by mail or private conveyance, and that if sent by private conveyance the person by whom they are sent shall make oath that they have not been opened by him or anyone else in their transit, is complied with in the case of forwarding depositions through an express company where the officer taking the depositions makes affidavit as to the individual agent of the express company to whom he delivered the depositions and this agent and all others of the express company into whose hands the depositions passed up to the time they were delivered to the proper clerk of court, make affidavit that the depositions have not been opened by them or any other person in transit, and the clerk makes affidavit that the depositions reached him in a sealed envelope directed to him, as clerk, with an endorsement which showed the title of the action and that the envelope contained depositions; (pp. 679, 680)

(9) Where two or more are found guilty of a conspiracy in restraint of trade, it is within the province of a jury to determine from the evidence who is most at fault and who would be benefited most by the formation and success of the conspiracy, and to render a verdict accordingly; (p. 681) and

(10) Upon the request of a jury for further instructions from the court, the court's oral restatement of a proposition contained in an instruction already given is not prejudicial error. (p. 680)

STANDARD OIL CO. et al. v. STATE.

(— Tenn. —, 100 S. W. 705, 1907.)

Construction, Statutes; Constitutional Law, Police Power; Conspiracy; Evidence; Verdict.

The Standard Oil Company, a Kentucky corporation, was engaged in the sale of refined oil in Gallatin, Tennessee, and had in its employ as a general agent one Comer who controlled its affairs and general policy in said state and certain other territory. One of Comer's subordinate agents and salesmen was C. E. Holt, who had control of the local agents and the business in their charge. As such dealer the Standard Company held an inferior quality of oil at said place for sale and delivery to merchants at prices in excess of its market value at other places. The Evansville Oil Company, a foreign corporation or partnership, with a principal place of business at Evansville, Indiana, was engaged in the same business as the Standard Company, was its competitor and was doing an interstate commerce business. In 1903, the Evansville Company sent a representative to Gallatin, Tennessee, who sold on its behalf sixty barrels of oil to merchants in that vicinity, who were customers of the Standard Company, the oil being of a better quality than that sold by the Standard Company at that place, and sold for one cent a gallon more than the Standard Company's price. As soon as this transaction became known to Comer, he immediately sent Holt to Gallatin, Tennessee, with instructions "to hold his trade and procure a countermand of the orders" given to the Evansville Company. In following these instructions, Holt made a gift to the Evansville Company's purchasers of one hundred gallons of oil, in consideration of which the orders were countermanded. When the Evansville Company's oil arrived in pursuance of the orders

given to its agent, the Gallatin customers refused to receive it, and the oil had to be stored and sold at ruinous prices. By reason of these acts of the Standard Company, the Evansville Company was compelled to abandon further effort to compete with the Standard Company at Gallatin and in that vicinity. Thereupon an indictment was found against the Standard Company and Holt, charging them with making an unlawful contract and agreement with one of their customers for the purpose and with a view to lessening full and free competition in the sale of oil, etc., in violation of the 1903 anti-trust law of Tennessee. A motion to quash the indictment having been made and overruled, a trial resulted in a finding of guilty against the defendants, the Standard Company being fined $5,000 and Holt $3,000, and judgment was entered accordingly. In affirming the judgment against Holt and reversing the judgment against the Standard Company, it was held that:

(1) An agreement, based upon a valuable consideration, not to deal in a competitor's commodity has the effect of destroying or lessening competition, and is within the prohibition of the Tennessee 1903 anti-trust laws, which declare unlawful all arrangements made with a view to lessening and destroying competition, or which tend to lessen and destroy competition, and to control prices; (100 S. W. 715, 716)

(2) Tenessee anti-trust laws of 1903 were intended to prohibit not only contracts and combinations between those engaged in the same business, made for the purpose of destroying, or which have a tendency to destroy, all competition, and which are injurious to the whole public, but those made and formed by any and all persons with a view to lessening, or which in their nature tend to lessen, competition to any material extent, to the injury of any part of the people of the state; (p. 715)

(3) A combination is within the prohibition of a state's anti-trust laws when its effect upon interstate commerce is but incidental; (p. 712)

(4) The sole object of the 1903 anti-trust laws of Tennessee is to correct and prohibit trade abuses within the state, and, as thus limited, said laws do not violate the commerce clause of the Federal constitution; (p. 709½)

(5) The phrase "importation or sale of articles imported into this state" in section 1 of the 1903 anti-trust law of Tennessee was intended to include and describe, among the articles of commerce to be protected, those which had been imported from other states and countries and commingled with the common mass of property in the state, and were no longer articles of interstate commerce, and, as thus construed said section is not invalid; (p. 711)

(6) An article of interstate commerce becomes subject to the revenue laws and the police power of a state when the article comes at rest in the state and is commingled with state property; (p. 712)

(7) In the reasonable exercise of the police power for the protection of the public health, morals, safety and welfare, states may restrain the general right of contract; (p. 719½)

(8) The only punishment to which a corporation is subject under the Tennessee 1903 anti-trust law is forfeiture of franchise or of right to do business, a corporation not being indictable and subject to fine under said law; (p. 712, *et seq.*)

(9) The word "person," as a general term, and when used in a statute, embraces natural and artificial persons or corporations, unless the context indicates that it is used in a limited sense; (p. 713)

(10) A general statute declaring the word "person" to include corporations is inapplicable to a subsequent statute showing a contrary legislative intention, although the general statute is made applicable not only to the original enactment, but to all amendments thereof; (p. 713)

(11) In the interpretation of statutes, the legislative intention governs, including everything within the intention of the legislature as much as if it were within the letter of the statute, and excluding everything within the letter of the statute which is not within the legislative intention at the time of the enactment of the statute; (p. 710)

(12) In arriving at the intention of the legislature in enacting a statute, courts may resort to the history of the times when the statute was passed, the prior state of the law, common law, the statute law of the state and the United States, and the particular abuse or defect which the act was meant to remedy, and then give such construction to the language used as to carry the intention of the legislature into effect, so far as it can be ascertained from the terms of the statute itself; (p. 710)

(13) Statutes must be so construed, if it can be done without violation to the evident intent of the legislature, as to avoid any conflict with the constitution of the state or that of the United States, every intendment, when the statute has been formally enacted, being made in favor of its validity, and where it is subject to two constructions, that must be given which will sustain it, rather than that which will defeat it; (p. 710½)

(14) Corporations can commit and be guilty of a criminal conspiracy at common law or one which is denounced by statute; (pp. 716½, 717)

(15) Where the offense with which the corporation is charged is the violation of a positive statute, the only intent necessary to the commission of the offense is the intent to do the prohibited act, and this the corporation will be held to have when it acts through its authorized agents and officers; (p. 717)

(16) Concurrence or combination of two or more persons or corporations must appear in order to constitute a conspiracy at common law or under a statute; (pp. 716, 716½)

(17) Under a statutory provision (section 3, Valentine anti-trust act of Tennessee) declaring that any person who shall engage in a conspiracy, or shall, as principal, manager, director, agent, or in any other capacity, knowingly carry out the conspiracy, is a party to it, corporations and their officers and agents who conceive, effect and carry out a conspiracy may be considered and counted as two or more persons necessary to constitute an unlawful conspiracy; (p. 717½)

(18) The gist of a criminal conspiracy in restraint of trade

is the arrangement made to lessen, or which tends to lessen, competition, it not being necessary that the conspirators should have agreed upon the means by which the conspiracy is to be effected; (pp. 718½, 719)

(19) Neither the number of persons engaged in the conspiracy, the form of the combination, the extent of the territory affected, the degree to which the combination was intended or has a tendency to lessen competition, the extent of the injury to the public, nor whether it be permanent or temporary in its character, is a material element of the offense, but it is the injury to the public in that territory, however restricted, that characterizes the interruption of trade as illegal; (pp. 715, 715½)

(20) Although corporations are not indictable and subject to fine under the Tennessee anti-trust law of 1903, they may become parties to a criminal conspiracy; (p. 716½)

(21) Corporations are liable civilly or criminally only for the authorized acts of their agents in the particular matter or business out of which the unlawful conduct emenates; (p. 718)

(22) Where competent and pertinent evidence within the knowledge or control of a party is withheld by him, it is presumed that the same is against his interest and insistence; (p. 718½)

(23) Where one, by himself or agent, directs the making of an unlawful arrangement, or the entering into of a conspiracy, he is presumed to be present and assenting to the means used by his co-conspirators in carrying out the object of such conspiracy or arrangement; (p. 719)

(24) All evidence showing the intention of the parties for entering into the particular arrangement or conspiracy claimed to be illegal is admissible; (p. 715)

(25) Although a previous contract or agreement is essential to establish the offense of conspiracy, it is not necessary that it appear that the conspirators came together and agreed upon the matter of carrying out the conspiracy, it being sufficient to prove that their acts were done with a view to accomplishing the purpose of the conspiracy, a conspirator being

responsible for the means employed by his fellow conspirators in accomplishing the unlawful purpose; (p. 719)

(26) In actions for criminal conspiracy, proof of an overt act is competent, though the alleged preconceived plans did not necessarily include the commission of the act done, when such act is one which would tend, directly or indirectly, to accomplish the common purpose; and it is often convincing evidence of the existence of the combined intent and agreement; (p. 719) and

(27) Where the evidence does not preponderate against the finding of a jury, the facts involved in its verdict are considered established. (p. 715)

STANTON v. ALLEN.

(5 Denio, 434, 49 Am. Dec. 282, N. Y. 1848.)

Public Policy; Illegal Contracts; Pleading; Stare Decisis.

All of the transportation lines on the Erie and Oswego canals formed a voluntary association for the purpose of establishing fair and uniform rates of freight and equalizing the business among the members. To this end, the members agreed upon the conversion of their properties into shares to be distributed among themselves in certain proportions entitling each to an income from the entire earnings of the association in accordance with the proportion of shares held by him. It was further agreed that rates were to be determined by a committee and were to extend to the transportation of freight and passengers. Each member bound himself to run all the boats he then had, according to the agreement and turn their earnings into the common stock, at the rates agreed upon and at which he was to be charged in a final distribution, and was prohibited, under severe penalties, from employing on any other terms boats subsequently acquired. He also bound himself to secure, as much as possible, the exclusion of others from their fair share of business, and if he should have more freight than he could carry to offer it to some of the associates; and if they did not take it, he was then authorized to procure its transportation without limitation as to rates, and after taking out the freight and certain charges, to turn in the balance to the common stock. An action upon a note given under this arrangement resulted in a judgment for the defendant, who claimed the note to have been given for an illegal consideration. In affirming this judgment, it was held:

(1) An arrangement for the maintenance of uniform rates and the prevention of competition in the carriage of freight

is injurious to the public and is void as against public policy under the common law; (5 Denio, 441, *et seq.*)

(2) The rule that contracts and agreements are void when contrary to public policy is one of the great preservative principles of a state, sound morality being the corner stone of the social edifice; (p. 441)

(3) Where a note shows upon its face that it was given in settlement of a claim arising out of an illegal consideration the note is unenforcible;

(4) In an action by the owner of a promissory note given without value, the defendant may interpose a plea of want of consideration; (p. 440)

(5) When the connection between an invalid agreement or arrangement and another transaction is clearly established by undisputed evidence, the question of the validity of such transaction is one of law; (p. 443) and

(6) An opinion of a court may serve as a precedent only when its language is applicable to the particular facts involved. (p. 442)

STATE v. AETNA FIRE INSURANCE CO.

(—— Ark. ——, 51 S. W. 638, 1899.)

Pleading; Practice.

A complaint against a foreign corporation alleged the incorporation of the defendant in a certain state, the doing of a specified business in Arkansas, and charged that while engaged in such business the defendant became a member of an unlawful combination; that such act on the part of the defendant, under the Arkansas 1899 anti-trust law, subjected it to the loss of its right and privilege thereafter to do business, to the payment of a specified penalty, and to forfeiture of its charter. A general demurrer was interposed to this complaint and sustained on the ground that it did not charge that the pool or combination was for the purpose, or had the effect, of influencing the defendant's business in Arkansas, no matter where formed. In reversing the lower court it was held that:

(1) Indefiniteness and uncertainty in a pleading cannot be reached by general demurrer; and

(2) Where a complaint follows the language of an *ambiguous* statute, thereby imperfectly stating a cause of action, a defendant should adopt either of two courses: (a) move that the complaint be made more specific and certain; or (b) answer with facts showing that the complaint is not the subject of the anti-trust act's prohibition and penalty.

STATE (ex inf. CROW) v. ARMOUR PACKING CO. et al.

(173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515, 1903.)

Combinations; Quo Warranto; Evidence, Agents' Admissions; Judgment.

The Armour Packing Co., Hammond Packing Co., Cudahy Packing Co., Swift & Co., foreign corporations, and others, were in a voluntary association, formed for the purpose of fixing and maintaining uniform prices to be charged for certain kinds of meats. The association employed a secretary at a monthly salary to attend to its business. Weekly meetings were held, at which uniform prices were fixed. The cutting of these prices was permissible only in cases approved by a competitor who was a member of the association. Underselling was punishable by a five dollars' fine for each sale. To oust these corporations from the state the attorney-general instituted proceedings in *quo warranto*. Immediately upon the institution of such an action the defendants discontinued their membership in said association. In affirming a special commissioner's finding to the effect that said defendants violated the anti-trust law of Missouri, and in granting an order of conditional ouster, it was held that:

(1) A voluntary association of independent wholesalers to prevent competition between themselves in the sale of an article of prime necessity is inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such a combination is merely the due protection of the parties against ruinous rivalry and no attempt is made to charge undue or excessive prices; (173 Mo. 388)

(2) In order to vitiate a contract or combination in restraint of trade, it is not essential that its result should be a complete monopoly, it being sufficient if it tends to that end and to deprive the public of advantages derived from free competition; (p. 391)

(3) It is no defense to a prosecution against an unlawful combination that such combination has proved to be of great benefit to the business in which it is engaged, employs and maintains a large number of persons, and that some of the witnesses themselves are in an unlawful combination, for, so long as arrangements, agreements, pools, trusts, and conspiracies to fix and maintain prices of articles of prime necessity are made unlawful, it is the court's duty to enforce such law; (p. 392)

(4) Statements and admissions made by the sole agents and representatives of a foreign principal during the transaction of his business are admissible in evidence against such principal, although such agents, where the principal is a corporation, are not its highest officers and directors; (p. 382) and

(5) The character of the punishment to be imposed in a *quo warranto* proceeding against a corporation rests in sound judicial discretion. (p. 392)

STATE (ex rel. STAR PUBLISHING CO.) v. ASSOCIATED PRESS.

(159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 1901.)

Corporations, Juris Publici, Contracts, By-Laws; Mandamus, Pleading, Judgment; Statutes, Extraterritorial Effect; Jurisdiction.

The Associated Press was a corporation having authority "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same." Under the laws of Illinois and Missouri it also had authority to exercise telegraph and telephone franchises. Its stockholders consisted exclusively of newspaper publishers. "The Star" was owned and published by the Star Publishing Co. at St. Louis, Mo. Not being able to procure certain news from the Associated Press, the Star Publishing Co. instituted a mandamus proceeding alleging its said inability, and a willingness and readiness to enter into a contract with the Associated Press for the purchasing of the particular news. The petition failed to allege specifically what kind of a contract the respondent was required to make and that such respondent refused to enter into same. While this proceeding was pending, the respondent had its charter amended by relinquishing all right to do a telegraph and telephone business. In refusing a peremptory writ of mandamus it was held that:

(1) A corporation organized for the purpose of buying, gathering, vending, distributing and publishing news, owes no such duty to the public as would impress its business with a public use; (159 Mo. 462)

(2) Neither the fact that a business has grown into one of great magnitude nor the fact that incorporation has been granted a company give the state the right to regulate what before incorporation was but a natural right; (p. 455)

(3) During the pendency of a mandamus proceeding against a private corporation, such corporation may formally abandon any of its dormant powers, on the principle that a corporation can abdicate all or a portion of the rights conferred upon it and even go out of business; (p. 424)

(4) A by-law of a private corporation which is not enacted for the express benefit of a third person and which fixes no compensation to be paid by him and provides for no other consideration for it, does not constitute a contract between such person and the corporation; (p. 423)

(5) "Mandamus is never granted in *anticipated* omission of a duty;" (p. 421)

(6) Neither the making of a contract nor the specific performance of an executory contract can be compelled by mandamus; (p. 422)

(7) Nor will a court award a discretionary writ of mandamus for the mere purpose of determining a barren technical right; (p. 458)

(8) "It is indispensable to granting the writ (of mandamus), that a prior express and specific demand be made of respondent of that which relator seeks, and that a refusal of such demand occur before relator has any standing in court;" (p. 421)

(9) A petition in mandamus must show that the defendant has it in his power to perform the act of which performance is sought; (p. 421)

(10) The judgment in mandamus, if for relator, must be specific both as to the rights of the plaintiff and the obligation imposed on the defendant; (p. 421)

(11) Penal statutes are construed strictly; (p. 467)

(12) Anti-trust laws of one state will not be enforced by another; (p. 466)

(13) State courts have no jurisdiction to enforce the Federal anti-trust laws; (p. 466) and

(14) General words employed in an opinion should be restricted to the particular facts of the case, and should not be extended to other cases which could not have been in the mind of the court at the time. (p. 455)

STATE v. BUCKEYE PIPE LINE CO. et al.

(61 Ohio St. 520, 56 N. E. 464, 1900.)

Constitutional Law, Police Power; Illegal Contracts, Public Policy; Statutes, Construction.

In several *quo warranto* petitions the defendants were charged with entering into a combination of nineteen corporations for the purpose of preventing competition in the production and transportation of a certain commodity and of fixing and maintaining the prices at which their various products should be sold. This was answered by the defendants, claiming that the 1898 anti-trust law, the Act under which the prosecutions were brought, was unconstitutional. The state interposed a demurrer to this defense, which demurrer was sustained, the court holding that.

(1) In so far as 1898 Ohio anti-trust law prohibits combinations of independent corporations to restrict trade competition and enhance prices, it is constitutonal;

(2) In the exercise of its police power a legislature may prohibit uses of property which are hurtful to the public in a legal sense;

(3) A contract made for the sole purpose of restraining trade or limiting competition is, in a legal sense, injurious to the public;

(4) Agreements made for the purpose of preventing competition in the production and transportation of a commodity, in order to enhance its price on the open market, are unlawful; and

(5) The validity of any of the provisions of a statute may be determined without passing on others unless its different provisions constitute a single scheme and are so interdependent as to show an intention that none of them would have been made if it had not been supposed that all could be enforced.

STATE v. CENTRAL OF GEORGIA RY. CO.

(109 Ga. 716, 35 S. E. 37, 48 L. R. A. 351, 1900.)

Constitutional Law, Construction; Contracts in Restraint of Trade; Public Policy.

The Middle Georgia & Atlantic Ry. Co. was incorporated in 1889 for the purpose of building and operating a railroad from Eatonton to Machen, with authority to extend the same in either direction to Savannah and Atlanta. During the years 1890 and 1893 this line was completed between the towns of Eatonton, Machen and Covington. In 1893 there were in operation at Covington two independent railways, the Middle Georgia and the Eatonton Branch Railroad—the latter being operated from Eatonton to Milledgeville by the Central Railroad and Banking Co. of Georgia, through a receiver. The operation of said branch being unprofitable, the receiver was subsequently permitted to abandon it. The Middle Georgia & Atlantic Ry. Co. thereupon entered into a contract with the Eatonton Branch Railroad for the temporary operation of its road, and, in June, 1896, purchased the railroad and corporate franchises of the Eatonton Branch. The Central Railroad & Banking Co. was reorganized and all of its property and franchises passed to the Central of Georgia Ry. Co. In December, 1896, this company also acquired, by purchase, the road and franchises of the Middle Georgia & Atlantic Ry. Co., thereby becoming the owner of a line of railway from Atlanta to Savannah via Macon and from Gordon to Milledgeville. In a suit against the Central of Georgia Ry. Co., the Middle Georgia & Atlantic Ry. Co. and the Eatonton Branch Railroad, to set aside said contracts of sale, under which the two last named roads were purchased by the Central of Georgia Ry. Co., upon the

ground that said contracts were in violation of art. 4, sec. 2, par. 4, of Georgia Const., it was claimed that the two companies, the Middle Georgia and the Central, were competing lines and that the effect of said purchase by the Central was to destroy competition and to create a monopoly in the business formerly transacted by both corporations. After a hearing an order was made refusing an injunction and the appointment of a receiver. On exceptions, said order was affirmed, the court holding that:

(1) The constitutional prohibition (par. 4, sec. 2, art. 4, Const.—Civ. Code, sec. 5800) preventing the general assembly from giving power to any corporation to make a contract to defeat or lessen competition, or to buy shares of stock in any other corporation, has no reference to and does not prohibit the purchase, ownership and control of branch roads; (48 L. R. A. 358)

(2) In construing a constitution its words are to be given such significance as they have at common law, especially if there is nothing in the constitution to indicate an intention that the language in question should have a different construction; (p. 356)

(3) A construction placed upon a constitution by the legislative department in the enactment of laws should be considered when interpreting its provisions; (p. 356)

(4) A constitutional provision is not self-acting when it is not declaratory of the common law and is not explicit regarding the new principle it attempts to establish; (p. 359)

(5) At common law the test as to whether agreements are in restraint of trade is whether or not they injuriously affect the public interests; (p. 355½)

(6) A contract will be set aside as against public policy at the instance of the state, only when it is injurious to the public interests; (p. 354)

(7) Whether or not a certain transaction will have the

effect of defeating or lessening competition must be determined by results taken in their entirety; (p. 358)

(8) Branch railroads are not competing lines to the main roads with which they connect; and

(9) Not all the combinations or contracts having a tendency to lessen competition or to restrain trade are necessarily illegal. (p. 354)

STATE v. CHILHOWEE WOOLEN MILLS CO. et al.

(115 Tenn. 266, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 1905.)

Corporations; Voluntary Dissolution.

Chilhowee Woolen Mills Co. was chartered in April, 1904, to engage in a woolen manufacturing business. At a stockholders' meeting, a board of directors was elected for one year and was instructed to proceed with business at once. No permanent directors were elected. Steps were then taken to procure real estate for a site and suitable machinery, and a call of ten per cent upon the stock was made. Previous to, and at the time of the incorporation of said company, there existed the Athens Woolen Mill Co., which conducted a prosperous business. The managers of this company made overtures to the principal promotors of the new enterprise, offering to let them join their company on certain terms, in order to prevent the new corporation from engaging in active business. While this proposition was open to all of the stockholders indiscriminately, a majority of them only were willing to accept it. A meeting was then held, and by a majority vote of the stockholders of the new corporation a resolution was passed that the new corporation be abandoned and dissolved. To this action a minority of the stockholders protested. The board of directors then passed a similar resolution, which was likewise passed by a majority vote, and over the protest of a minority. It appears that one of the reasons for the old company's desire to put a stop to the new enterprise was the re-employment of certain persons who had been largely instrumental in its success. These persons were among those of the stockholders in the new enterprise who consented to its dissolution and abandonment. A bill was thereupon filed on behalf of the majority of the stockholders

in the new company against the corporation and the minority of its stockholders for a dissolution and surrender of the charter. The chancellor held that the complainants were not entitled to the relief prayed. On appeal to the court of chancery appeals, the lower court was reversed. On further appeal to the supreme court, the court of chancery appeals was affirmed, the supreme court holding that:

(1) A voluntary dissolution of a private corporation may be accomplished upon the application, in good faith, of a majority of the stockholders, over the wishes of a minority, where no business has been done by the corporation and no debts or obligations have been incurred; (115 Tenn. 272, *et seq.*)

(2) Under sections 5165, 5181, Shannon's Code, providing for involuntary dissolution of a corporation, stockholders may voluntarily surrender the charter of their corporation; (p. 271)

(3) 1903 anti-trust laws declaring unlawful all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessening, or tending to lessen, full and free competition in the manufacture or sale of articles of domestic raw material, do not prohibit the abandonment and dissolution of a private corporation at the instance of a majority of its stockholders in favor of a competing company, where this is done in good faith, there is no actual arrangement between the two corporations to lessen, or which tends to lessen full and free competition, etc., and it is done merely because it would be unprofitable for the corporation to continue in business; (p. 277) and

(4) Unless expressly prohibited, shares of stock in a private corporation may be voted by proxy. (p. 278)

STATE (ex inf. CROW) v. CONTINENTAL TOBACCO CO. et al.

(177 Mo. 1, 75 S. W. 737, 1903.)

Statutes; Corporate Powers; Quo Warranto; Practice.

About 1890 Allen & Ginter, of Virginia, W. Duke Sons & Co. of North Carolina, W. S. Kimball & Co., of Rochester, New York, and Goodwin & Co. and Kinney Bros., of the city of New York, New York, cigar and tobacco manufacturers, were merged into the American Tobacco Co., a corporation organized under New Jersey laws. Subsequently the last named company purchased for cash the entire property, trade-marks, business and good will of the following Missouri corporations: J. G. Butler Tobacco Co. in 1895, Drummond Tobacco Co. in September, 1898, and Brown Bros. Tobacco Co. in October, 1898. Thereupon the first two corporations ceased to do business under their charters. The corporate existence of the last named corporation expired by its charter limitation in 1901. In December, 1898 the Continental Tobacco Co. was organized under New Jersey laws, with $75,000,000 capital, to do a general tobacco business, to own, hold and purchase factories, warehouses, etc., without limitation as to situation of property. In the same month the American Tobacco Co. sold to the Continental Tobacco Co. all of its property, trade-marks, business and good will, concerning the manufacture of chewing tobacco, retaining its right to manufacture and sell smoking tobacco. In June, 1899, the Continental Tobacco Co. was admitted in Missouri to do business as a foreign corporation. Afterwards the last named company acquired for cash the property, trade-marks, business and good will of Wright Bros. Tobacco Co., a Missouri corporation. None of the selling companies

were insolvent at the time of selling out. In February, 1899, a *quo warranto* information against the Continental Tobacco Co. and its constituent companies was filed, charging them with being an unlawful trust or combination, formed for the purpose of limiting the production or manufacture of chewing tobacco, within the state of Missouri and throughout the United States, and of regulating or fixing the price of raw tobacco and of manufactured chewing tobacco, with a view of lessening competition in the manufacture and sale of same, thereby acquiring a monopoly of such business within the state of Missouri and throughout the United States. This proceeding was referred to a special commissioner for the purpose of hearing evidence and reporting his conclusions. On the hearing an application was made for the subpoena of non-resident witnesses. This application the commissioner refused on the ground that the statute upon which it was based was unconstitutional, and, on the evidence, found for the respondents. In affirming his report and discharging respondents, it was held that:

(1) A statute prohibiting corporations from creating or entering into any pool, trust, agreement, confederation or understanding with any other corporation, partnership, individual or any other person, or association of persons, for the regulation or fixing of prices, or the maintenance of such prices when so regulated and fixed, or for the fixing or limiting of the amount or quantity of any article of manufacture, does not prevent one corporation, in good faith, and when done in the legitimate pursuit of its business, from purchasing for cash all the assets of another corporation engaged in a similar business; (177 Mo. 32)

(2) Statutes will not be considered constitutionally, unless their constitutionality is directly involved; (p. 31)

(3) Under an authority to own, maintain and operate plants, machinery, warehouses, etc., as may be necessary to conduct a business, the power to purchase any property,

plants or machinery necessary to properly conduct such business is included; (p. 34)

(4) Corporations, when acting within the express or implied purposes of their creation, have the same power to contract as have individuals; (p. 34)

(5) "A strictly private commercial corporation, owing no peculiar duties to the public, may, with the consent of all the shareholders, and in the absence of the express or implied restriction in its charter, or prejudice to the rights of creditors, transfer all of its property to another corporation or person, if the latter is capable of taking;" (p. 35, et seq.)

(6) A corporation carries its charter powers wherever it goes; (p. 33)

(7) A proceeding to oust a corporation from the exercise of its franchise because it is claimed to be a trust or an illegal combination is in the nature of a criminal prosecuton and should be sustained only on a clear showing of respondent's guilt by testimony fully satisfying the minds of the court; (p. 37) and

(8) An application for the subpoena of foreign witnesses, under section 8983, Revised Statutes 1899, must show clearly the materiality of the desired testimony, as well as the competency of the witnesses sought to be produced. (p. 43)

STATE v. CUDAHY PACKING COMPANY.

(82 Pac. 833, Mont. 1905.)

Constitutional Law, Class Legislation; Statutes, Construction.

The information in this case charged the defendants with criminal conspiracy because they unlawfully agreed and combined together to fix and control the price of a certain article of commerce and to destroy competition between them, contrary to the provisions of section 321, Penal Code. To this information the defendants demurred on the ground that the facts stated did not constitute a public offense. The demurrer having been sustained and judgment for defendants rendered, the case was appealed. In affirming the lower court, it was held that:

(1) A statute exempting from its operation certain classes of persons violates the 14th Amendment to the Federal Constitution, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws;

(2) The interpretation put upon the Federal Constitution by the highest Federal court is conclusive upon the state courts;

(3) Sections 321 and 325, Penal Code, are so dependent upon each other that both are invalid as constituting class legislation;

(4) "If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But, if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative;"

(5) The legislative intention of a statute must first be de-

termined from the plain meaning of the words used, and only when there is a doubt as to such intention must other rules of construction be applied; and

(6) Penal statutes are to be strictly construed—"not so strict as to defeat the plain intent of the Legislature, but so strict as to give the words of the statute the sense in which they are obviously used."

STATE (ex inf. CROW) v. FIREMANS' FUND INSURANCE CO.

(152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363, 1899.)

This was a *quo warranto* proceeding against seventy-three fire insurance companies, who entered into an alleged illegal combination to control the insurance business in Missouri. It appeared that immediately after the passage of 1895 amendment to Missouri anti-trust act, bringing within its provisions insurance companies, a large number of insurance local agents organized and became members of the Underwriters' Social Club of St. Joseph; that an old method of fixing rates through another association was discontinued, and that a new mode securing the same object was established, consisting (a) in the publication of a rate book by an insurance expert, who was previously in the employ of the former organization, under salary, and the use of such book and sheets modifying the rates from time to time by the insurance agents; and (b) by the several members of this club transacting all of the insurance business for their respective companies under the control and supervision of the secretary of this club. In rendering judgment against respondents or defendants it was held:

(1) That the understood course of dealing to fix and maintain prices or premiums to be charged for insuring property against loss by fire was an unlawful combination within the meaning of the Missouri 1895 anti-trust Act; (152 Mo. 37)

(2) That the existence of a pool or trust may be established by facts and circumstances; (p. 41)

(3) That an understood course of dealing to fix and maintain prices or premiums to be charged for insuring property against loss by fire, constituting a pool, trust, or conspiracy, is within the title of 1891 Act, which is "an Act providing

for the punishment of pools, trusts and conspiracies to control prices, and as to evidence and prosecution in such cases;" (p. 45)

(4) That the right to contract must not be exercised in a way so as to interfere with others having similar rights; (p. 47)

(5) That a foreign corporation's license to do business within a state does not create a vested right in the corporation; (p. 48)

(6) That section 6 of 1891 Act as amended in 1895 discriminating against foreign corporations by making the act of an agent *prima facie* proof of the act of such company, and sections 9 and 10 of said Acts allowing taxing of attorneys' fees against defendants, if unconstitutional, are separable from the valid parts of said Acts; (pp. 48, 49) and

(7) That by making common cause with co-defendants, who were proved guilty of an offense against state anti-trust laws, will authorize the entry of a judgment against all defendants, although there is no direct proof against some of the defendants aside from admissions in the pleadings. (p. 50)

NOTE.

Two judges did not consent to entry of judgment against defendants who made common cause with co-defendants, but against whom no evidence was produced. One dissenting judge held that the evidence was insufficient to convict, claiming that the inferences to be drawn from the evidence were susceptible of a different interpretation than that put by the majority court.

The foregoing case should not be considered authoritative:

(a) As to the proposition that an agent's knowledge of the unlawful character of the club was knowledge to the principal and that the agent's acts were the acts of his principal, because the answers of the companies admitted their guilt, and therefore a decision on this point was unnecessary.

(b) On the proposition that where a defendant claims a statute which he is charged with having violated to be unconstitutional, he thereby admits the charge, a decision on this point

was also unnecessary, for the reason that the pleadings permitted no other theory upon which the case could have been tried with reference to the constitutionality of the act or acts involved.

In so far as insurance companies come within anti-trust laws, this case is not in conflict with Aetna Insurance Company Case because the statutes of Kentucky and Missouri are essentially different, in this: that the Kentucky statute does not embrace insurance companies whilst the Missouri statute expressly includes such companies.

STATE v. GAGE.

(—— Ohio St. ——, 73 N. E. 1078, 1905.)

Under anti-trust act of April 19, 1898, Gage was indicted for being a member of the Delaware Coal Exchange, an association of coal dealers organized to prevent competition, etc. The indictment was demurred to, principally on the ground that the statute was unconstitutional. Limiting the interpretation of the statute to the case before the court and treating the offense charged in the indictment as one punishable at common law, the conviction was sustained.

STATE v. JACK.

(69 Kan. 387, 76 Pac. 911, 1 L. R. A. (N. S.) 167, 1904; aff'd 199 U. S. 372.)

Constitutional Law; Legislative Power; Immunity.

In September, 1903, the attorney-general and one of the county attorneys began an investigation against certain coal mining operators who were said to be in an unlawful combination for the purpose of fixing the wholesale and retail prices of coal within a certain district in Kansas. Section 10, chapter 265, Laws 1897, confers upon the district court and judges thereof, upon proper application by a county attorney or the attorney-general, the power to order the issuance of subpoenas for witnesses to compel their attendance, and to punish as for contempt upon refusal to testify. Under this section a written application was made by said attorneys to one of the district courts for an order authorizing the issuance of a subpoena against certain parties as witnesses. John D. Jack was one of the parties named in the application as having knowledge of the existence of said combination. An order for a subpoena was entered, the subpoena issued, and was served upon Jack. He appeared in court and moved that the subpoena be quashed. On overruling this motion he refused to answer certain questions, claiming that answers to such questions might incriminate him. This motion was likewise overruled on the ground that section 10, under which the state attorneys were proceeding, granted ample immunity from prosecution, etc. Wishing to stand upon his right of refusal, Jack was fined for contempt of court. On appeal to the supreme court in affirming the district court, it was held that:

(1) A state legislature may provide, through courts of justice, a mode for investigation of a violation of state crim-

inal laws, such a provision constitutng due process of law within the meaning of the 14th Amendment to Federal Constitution;

(2) By granting to witnesses amnesty from prosecution, imprisonment, fine, penalty, or forfeiture, a legislature has power to compel such witnesses to furnish evidence against themselves;

(3) Section 10 of anti-trust act of 1897 affords a witness complete immunity against criminal prosecution, imprisonment, fines, penalties and forfeitures, for any violation of the Act about which the witness might give evidence upon a proceeding or investigation by the state to acquire information as to violations of the Act, such testimony not being usable against him in any proceeding of a criminal nature;

(4) The immunity afforded by section 10 of said Act is coextensive with the constitutional privilege contained in section 10 of Bill of Rights;

(5) A provision granting immunity on account of self-incrimination from prosecution within the same jurisdiction is sufficient;

(6) An examination under section 10 of anti-trust law of 1897 must not proceed beyond a violation of that law, as the immunity afforded by said section is confined to prosecutions, etc., under state, and not Federal, laws; and

(7) The immunity granted by section 10 is personal to the witness, and is a privilege which cannot be claimed in behalf of any other person or corporation.

STATE (ex rel. ELLIS) v. KING BRIDGE CO. et al.

(7 C. C. N. S. 557, Ohio, 1906.)

Quo Warranto; Jurisdiction, Venue; Foreign Corporations, Service.

In this case a number of foreign and domestic bridge companies were proceeded against by *quo warranto* to oust the domestic companies from their corporate franchises and to oust the foreign corporations from the exercise of their rights and privileges to do business within the state. The petition against the various companies in substance alleged that the defendants entered into a conspiracy in restraint of trade and had become parties to certain trust agreements set forth in the petition; that the conspiracy and combination was entered into for the purpose of creating and carrying out restrictions in trade and commerce, increasing the price of merchandise and commodities, preventing competition in the sale of merchandise and commodities, and fixing a figure whereby the price of merchandise and commodities to the public should be controlled and established; that in pursuance of such conspiracy the defendants agreed and bound themselves to keep the price of articles of merchandise and commodities at a fixed or standard figure and to preclude a free and unrestricted competition among themselves, and to pool and combine and unite their interests that the price might be affected. As a second cause of action it was charged that a conspiracy had been entered into between the American Bridge Co. and the other defendant bridge companies, whereby it was agreed that the American Bridge Co. was to furnish preliminary estimates of bridges to the other defendant companies, and that the other defendant bridge companies were to purchase the bridge material of the American Bridge Co. ex-

clusively; that the defendants, by entering into said combination, agreed to increase the price of bridges and bridge material and to combine to unite their bids for the sale of such material and to divide the excess above the proper cost of work among the parties to the agreement. Some of the defendants moved to quash service of summons and other defendants demurred to the petition. In overruling the demurrers and quashing service of summons upon one of the defendants it was held that:

(1) Under the Valentine anti-trust act (sec. 4427–2, Rev. Stats.), making it the duty of the attorney-general, or the prosecuting attorney, to institute *quo warranto* proceedings in a court of competent jurisdiction in any county in the state where such corporation or association exists or does business or may have a domicile, and sec. 4427–11 of said act providing that the court in which such proceeding shall be pending may cause non-resident parties to be summoned and made parties defendant whenever the ends of justice require, *quo warranto* proceedings against corporations for a violation of said act may be instituted in any county where one of the defendant corporations may be legally found; (p. 567, *et seq.*)

(2) A statutory provision (sec. 6768, Rev. Stats.) requiring any proceedings in *quo warranto* to be brought in the county in which the defendant, or one of the defendants, resides, or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business, and a provision (sec. 5035 *ibid.*) permitting the issuance of summons to any other county against one or more of the defendants at the plaintiff's request, whenever the action is rightly brought in any county, authorize the bringing of *quo warranto* proceedings against offending corporations wherever one or more of them is situated or has a place of business, whereupon process may issue to any other county where any other defendant corporation is situated, and permit the joinder of non-resident with resident corporations, the court acquiring jurisdiction over all when it acquires jurisdiction over one corporation; (p. 561, *et seq.*)

(3) When the object of a proceeding in *quo warranto* is not merely to oust separate defendant corporations for individual wrong-doing, but is to accomplish the destruction of an unlawful trust or combination of persons, firms, partnerships, corporations or associations, or of any two or more of them, the gist of the action is in the unlawful combination of all the corporations defendant, involving the acts of all the alleged conspirators, who are necessary parties to the action, in order that they may explain and defend, if possible, the charges of combination made against them all, regardless of the fact that some of them have never, as individual corporations, done any business in the county where the suit is brought; (p. 568)

(4) Section 5041, Rev. Stats., requiring service of summons against a domestic corporation to be made upon certain officers and agents in a prescribed manner, is not complied with by a return showing that the summons was served by copy at the residence of the president of the corporation, and failing to state that none of the required officers and agents could be found or that the copy of summons was left at the proper place of business of the corporation with the proper person; (p. 560) and

(5) Where a statute requires that service of process upon a foreign corporation shall be upon the managing agent, a return upon such a corporation failing to show that service was had upon such agent is defective and will be quashed. (p. 570)

STATE v. LANCASHIRE FIRE INSURANCE CO.

(66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, 1899.)

Statute, Construction, Extraterritorial Effect.

In an information against the Lancashire Fire Insurance Company it was alleged that it was a foreign corporation, organized under the laws of England; that on a certain date it was engaged in Missouri in the fire insurance business, and that while so engaged it became and was a member of a pool or combination with other corporations engaged in a similar business to regulate or fix the price or premium to be paid for insuring property. The defendant answered denying that it was a member of a trust, etc., to fix or regulate the price or premium of insurance on Arkansas property. A demurrer to this answer was overruled by the trial court. In affirming this judgment it was held that:

(1) The 1899 anti-trust act does not apply to pools or combinations created outside of Arkansas, and is not intended to, and does not, affect persons, property or prices within the state; (66 Ark. 477)

(2) A penal statute cannot be extended by implication; (p. 472)

(3) An unconstitutional meaning will not be given to a law if it is susceptible of any other construction; (p. 477)

(4) General words used in a statute are taken as limited to cases within the jurisdiction of the legislature passing the statute and are confined in their operation to matter affecting persons and property in such jurisdiction; (p. 473)

(5) The legislature is presumed to intend that its statute shall not apply to acts or contracts done or effected beyond the limits of the state and having no reference to or effect upon persons or property within the state; (p. 472)

(6) In determining the meaning of a statute courts must look mainly to the language of the act itself, regardless of the expressions of individual members of the legislature concerning it; for, whatever the legislature may have intended, such intention can have no effect unless expressed in the statute; (p. 472) and

(7) In construing a statute it will be presumed that the members of the legislature are familiar with certain well known rules of construction and have had them in view in framing the law. (p. 472)

STATE v. LAREDO ICE CO. et al.

(96 Tex. 461, 73 S. W. 951, 1903.)

Statutes; Construction.

The state instituted a proceeding against Laredo Ice Company and others to recover certain penalties. It was alleged that the defendants had entered into and maintained, during a specified period, a combination or agreement with each other by which they had formed a pool, trust, agreement, combination, confederation, understanding and association to regulate and fix the price of ice in a certain county within the state. A demurrer to the petition on the ground that the anti-trust act of 1899 was unconstitutional was sustained, and the petition was dismissed. On appeal to the court of civil appeals, that court certified the following question to the supreme court: "Is the Act of the Twenty-Sixth Legislature (chapter 146, Acts 1899 p. 246) under which this action is brought constitutional?" In answering affirmatively it was held that:

(1) A statute will not be held unconstitutional where an obnoxious provision may be eliminated from the statute and the remaining provisions would be sufficient to accomplish the general purpose the legislature had in its enactment;

(2) Section 8 of Texas 1899 anti-trust law is separable from the rest of the provisions of said act;

(3) A provision in a statute declaring that the fines and penalties provided for shall be held and construed to be cumulative of all existing laws does not have the effect of consolidating such statute with, or making it a part of, all the laws on the same subject, but the last statute is merely to be harmonized with the prior laws on such subject;

(4) Laws said to be *in pari materia* are parts of a common system or policy, but are not one and the same law;

(5) The imposition of fines and penalties upon violators of the law is a matter peculiarly within the power and discretion of the legislature, and courts have no right to control or restrain that discretion, except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind; and

(6) 1899 Texas anti-trust law is not unconstitutional because it imposes excessive and unreasonable penalties, for the act gives a wide range to the discretion of the jury between the minimum and maximum penalties.

STATE v. MISSOURI, KANSAS & TEXAS RY. CO.

(—— Tex. ——, 91 S. W. 214, 1906.)

This was a suit to recover penalties for a violation of Texas anti-trust laws by a domestic railway and foreign express company. The specific offense charged consisted in entering into a contract prior to the taking effect of 1903 anti-trust act by these corporations, whereby, among other things, the express company was given the exclusive right to carry on its express business on the railway company's line, excluding three other and competing express companies from the benefits thus secured. It was held:

(1) That the contract entered into showed a *purpose* to create and carry out a restriction in the free pursuit of a business within the meaning of said anti-trust act; (91 S. W. 219)

(2) That an illegal purpose alone to violate said Act is not enough, but that the contract entered into furnished the means to carry out such a purpose, and thereby made the offense complete; (p. 219½)

(3) That under the statute involved it is immaterial when a combination was formed if it is allowed to be *continued* after the statute took effect; (p. 219½)

(4) That legislation against monopolies being enacted in the exercise of police power, by making the *continuance* of a monopoly or combination illegal does not impair the obligation of a valid contract; (p. 220)

(5) That the Act embraces railroads as well as express companies; (p. 220½) and

(6) That to meet a general demurrer a certain allegation showed the carrying out of the illegal contract. (p. 220½)

STATE v. NEBRASKA DISTILLING CO. et al.

(29 Neb. 700, 46 N. W. 155, 1890.)

Contracts in Aid of Monopoly.

Quo warranto proceedings were brought against Nebraska Distilling Company to forfeit its charter because, after its incorporation in Nebraska, it conveyed all of its property to, and its franchises were exercised by, the Distillers' and Cattle Feeders' Trust, first an unincorporated association and afterwards incorporated under the laws of Illinois. The manner in which said "Trust" obtained control and management of this and other corporations was as follows: The corporate real estate of a corporation about to become a member of said association was deeded to one of the corporation's shareholders as trustee for the others, who then leased such real estate to such corporation for a term of years. The corporation's capital stock was then transferred to the association's trustees, the original issue of stock canceled, and a new issue of stock made to the trustees of the association in exchange of trust certificates based upon an agreed amount. The board of directors of the company then resigned and a new board was elected, a majority of whom were taken from the association trustees. The association trustees owned and held in common the capital stock of the various corporations composing this association, had rights and powers of shareholders, and could and did exercise full control and direction over the action, management, and business of the companies whose stock had been assigned and transferred. In this way the trustees were enabled to regulate at will the production and price of the commodities manufactured by the various members who were members of the association. It was shown that soon

after the Nebraska Distilling Company had become a member of the association, its plant was shut down, the company ceased doing business, and its stockholders attempted to effect a voluntary dissolution of the corporation. In awarding the relief sought, it was held that:

(1) Any contract in furtherance of a monopoly, and growing out of transactions in connection therewith, is against public policy and void; (46 N. W. 160)

(2) All acts of a corporation, which, by the terms of its charter, it is unauthorized to do, whether *mala prohibita* or *mala in se,* is in excess of its powers and therefore unlawful; (p. 160)

(3) Contracts in total restraint of trade are void; (p. 160)

(4) A transfer of all corporate property and relinquishment of control over corporate affairs to an unlawful combination are good causes for forfeiture of a corporation's charter; and

(5) The property of a corporation during pendency of a *quo warranto* proceeding against it for an abuse of its powers is in *custodia legis,* and no disposition of such property without the court's consent will be permitted. (p. 161)

STATE v. OMAHA ELEVATOR CO. et al.

(— Neb. —, 106 N. W. 979; — Neb. —, 110 N. W. 874, 1906.)

Construction, Statute; Injunction.

This case was heard on demurrer to a petition filed on behalf of the state against 24 domestic and foreign corporations and 26 individuals composing the Nebraska Grain Dealers' Association. From the petition it appeared that the members of this association were owners of grain elevators, engaged in buying, selling and shipping grain, and controlling about 90 per cent of the business in the state; that by rules, by-laws and regulations of the association grain could be sold and bought only at prices fixed by the association's officers and bought and sold from and to only such persons as were "regular" dealers; that competition between the members was eliminated; that any violation of the association rules, by-laws and regulations subjected the offender to penalties; and that, in carrying out the purposes of this association, meetings were held, uniform prices were fixed and maintained, a black list of delinquent members was kept, and rebates from railroads were accepted. The principal relief sought by the petition was to restrain said individuals from continuing in, and being members of, this association, to forfeit the franchises of the domestic companies, and to oust the foreign corporations from the state. A demurrer raising the question of want of jurisdiction, defect of parties defendant, improper joinder of causes of action, and insufficiency of statement of cause of action, was overruled, the court holding that:

(1) Where a later statute fails to embrace within its provisions a material portion of a former unrepealed enactment on the same subject, so much of the former act is repealed by

implication as is included in the later statute; (106 N. W. 984)

(2) The 1905 anti-trust law repeals by implication the 1897 law (c. 79) on the same subject, except section 1; (p. 984½)

(3) Where a general statute is broad enough in its terms to include the subject-matter of a special statute, as well as other matters, the general statute will apply to all matters not specifically covered by the special statute, and as to such matters the special statute alone will apply. But where a special act does not cover a particular matter which is afterwards provided for by a general enactment, both acts may stand and be enforced where not in conflict with each other; (pp. 984, 985) and

(4) Injunction proceedings against grain dealers will lie under the anti-trust law of 1905 notwithstanding prior special provisions covering this class of tradesmen; (p. 985½)

NOTE.

This case turned on the question of jurisdiction and the particular Act applicable. Other points raised by the demurrer seem to have been abandoned in the argnments.

After the demurrer was disposed of, the case was heard by a referee, who made report, to which there were exceptions by the state, as well as by several of the defendants. In sustaining the referee's findings and dismissing the action as to some of the defendants, it was in part held that:

(a) No forfeiture of a defendant corporation's charter can be obtained in an action brought for injunction to restrain violations of the Junkin Act; (110 N. W. 876½, *et seq.*) and

(b) An arrangement between a shipper and a railroad company for a reduced rate on all shipments by way of its railroad, in consideration that the shipper establish and maintain a shipping point, does not constitute the receipt and acceptance of a rebate under section 14 of the Junkin Act, although such an arrangement is detrimental to rival carriers. (p. 878½, *et seq.*)

STATE v. PHIPPS et al.

(50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. Rep. 152, 4 Interst. Com. Rep. 297, 1893.)

Interstate Commerce, Insurance.

Several agents of foreign insurance companies were accused of compelling local agents to observe combination rates established by their principals, who had combined to control the price and rate of insurance in Kansas. After a trial some of the defendants were convicted and fined and others were acquitted. On appeal, it was contended that the Act under which the indictment was found did not apply to defendants nor to their principals for the reason that the business of insurance is interstate commerce, and that therefore the Act, if it did apply, was in conflict with the Federal constitution and acts of congress. The judgment of conviction was affirmed, however, the court holding that:

(1) A state has the power to regulate and control insurance business done within the state, whether by domestic or foreign corporations;

(2) The word "trade" is not synonymous with interstate commerce; and

(3) The mere conduct of insurance business does not constitute it interstate commerce.

STATE v. PORTLAND NATIONAL GAS & OIL CO.

(153 Ind. 483, 53 N. E. 1089, 1899.)

Public Policy, Competition; Quo Warranto, Judgment.

Two domestic competing corporations—Portland Natural Gas & Oil Company and Citizens' Natural Gas & Oil Mining Company entered into and carried out an agreement or combination whereby the rate of gas to be charged by them to the consumers of a certain city was fixed and regulated, and under which agreement neither of the companies could do, or did, business with any one while he remained a patron of the other. In a *quo warranto* proceeding brought against one of these companies it was charged that in carrying out the compact or agreement the defendant exercised powers not conferred by law, and committed an act violative of law, and hence it was sought to oust such defendant from longer or further exercise of its corporate rights. A demurrer to the petition for insufficient facts having been sustained and judgment rendered for the defendant, the state appealed. In reversing the lower court it was held that:

(1) A corporation forfeits its right to exercise its franchise whenever it has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement the performance of which is detrimental or injurious to the public; (153 Ind. 486)

(2) "Whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is therefore deemed to be unlawful, on the grounds of public policy;" (p. 488)

(3) The law regards an act which restricts or stifles com-

petition as incompatible with public policy, without proof of evil intent on the part of the actor or actual injury to the public, the test being not as to the degree of injury inflicted upon the public, but whether the inevitable tendency of the act is injurious to the public; (p. 489)

(4) When the right of eminent domain is conferred upon a corporation, such corporation is public in its character; (p. 487)

(5) A *quasi* public corporation is bound to carry out the purposes or objects of its creation; (p. 488)

(6) A state has a right to proceed by way of *quo warranto* against a corporation which has abused its corporate powers by some grave misconduct against the law of its creation, or something material which tends to produce injury to the public, but not when the act merely affects private interests for which other adequate remedies are provided; (p. 486) and

(7) In *quo warranto* proceedings against a corporation it is discretionary with the court to either render a judgment of forfeiture of the corporate franchise or to merely prevent the corporation from carrying out or continuing the illegal act or acts charged and established. (p. 491)

STATE v. SCHLITZ BREWING CO.

(104 Tenn. 715, 59 S. W. 1033, 1900.)

Statutes, Title; Constitutional Law, Class Legislation; Jurisdiction; Injunction; Practice.

The right of the Schlitz Brewing Company, a foreign corporation, and its agent to do business in Tennessee was challenged and an injunction restraining them from doing such business was sought in a proceeding by the state, in which it was charged that the defendants, as principal and agent, had entered into, and for many years had enforced, an arrangement, contract, trust or combination with other brewers for the purpose and with the tendency and effect of lessening competition in a certain commodity, and of dominating and controlling its price within the state. A demurrer to this bill was sustained on the ground that 1897 Tenn. anti-trust law, under which the proceeding was instituted, was unconstitutional, and on account of lack of jurisdiction in the court in which the bill was filed. In reversing said judgment it was held that:

(1) A statutory provision which only excepts or excludes certain transactions from the prohibitions and penalties of an Act of which the provision is a part necessarily relates to the subject of the particular legislation involved and is covered by the title of such Act; (104 Tenn. 727–730)

(2) A statutory provision which is germane to the general purpose of an Act does not bring in a different subject; (p. 742)

(3) A title of a bill is sufficiently expressed, although it does not recite the subdivisions, provisos and exceptions contained in its body; (p. 729)

(4) Under a constitutional provision requiring every bill

to embrace only one subject to be expressed in its title it is unnecessary that an enactment should cover the entire domain within its title; (p. 728)

(5) A constitutional requirement that every bill shall embrace only one subject to be expressed in the title is mandatory as to the singleness of the subject of the bill and as to the expression of that subject in the title, and if a given bill embraces two subjects, or but one subject and it is not expressed in the title, the attempted legislation is invalid *in toto;* (p. 726)

(6) A statutory provision exempting transactions relating to farm products and live stock while in the producer's or raiser's possession is a natural, reasonable, and, therefore, constitutional, classification of person and subject-matter;

(7) "Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious;" (p. 731)

(8) The word "court" in section 3 of 1897 Tennessee anti-trust law refers to the tribunal before the conviction is had, including the judge and jury, and does not designate the presiding judge alone; (p. 739)

(9) An Act must be construed as a whole; (p. 730)

(10) Every reasonable doubt is resolved in favor of the constitutionality of a statute regularly passed; (p. 740)

(11) There is no unrestricted right of contract; (p. 746)

(12) An Act is recognized as "the law of the land" when: (a) it was passed with due form and ceremony; (b) it embraces equally all persons who are now or may hereafter be in like condition, and, if class legislation, it is, in addition, natural and reasonable in its classification; and (c) it conforms to all other requirements of the constitution; (p. 747)

(13) Courts have no power to review the legislative policy expressed by a statute; (p. 741)

(14) A court of chancery has jurisdiction to restrain a corporation from violating any of the provisions of the 1897 Tennessee anti-trust law; (p. 749)

(15) The resident agent of a foreign corporation is a

necessary party to an action brought to restrain such corporation from doing business within a state contrary to its anti-trust laws; (p. 752) and

(16) In an action against a corporation and its agent under section 2, Tennessee anti-trust law 1897, no personal judgment can be rendered against the agent in the first instance. (p. 752)

NOTE.

On the question of class legislation the doctrine announced in the foregoing case clashes with the Connolly Case, decided by United States supreme court two years later.

STATE v. SHIPPERS' COMPRESS & WAREHOUSE CO.

(95 Tex. 603, 69 S. W. 58, 1902.)

Quo Warranto; Evidence; Statutes.

The Shippers' Compress & Warehouse Company was organized under Texas laws in June, 1901, with the power to do a general grain elevator and public warehouse business. In September, 1901, said company purchased six compresses—three at Dallas, one at Terrell, one at Gainesville, and one at Cisco, Texas—being all the compresses at those places. At that time there were seventy compresses in the state of Texas. In a petition filed on behalf of the state against the Shippers' Compress & Warehouse Company, to forfeit its charter, it was charged that its incorporators entered into an agreement, confederation and understanding, for the purpose of creating and carrying on restrictions in trade and preventing competition, and that in pursuance of such an agreement the several compresses referred to were acquired contrary to Texas anti-trust laws. After a trial, the court rendered judgment against the state. On appeal to the court of civil appeals this judgment was affirmed. In affirming the latter judgment, the supreme court held that:

(1) To justify a forfeiture of a corporation's charter claimed to have been procured in violation of anti-trust laws, the state must establish the unlawful intent on behalf of the incorporators;

(2) A state may, in a proper proceeding, forfeit the charter of a corporation obtained through the fraud of its incorporators;

(3) The procuring of a charter of a corporation for an illegal purpose constitutes a fraud upon the state, for which

it can forfeit such charter in a proper judicial proceeding; and

(4) Texas 1895 anti-trust law is valid to the extent that it authorizes the state to revoke the license of a foreign corporation, or to forfeit the charter of a domestic corporation for acts done in violation of it.

NOTE.

Points (2) and (3) are necessarily involved in this case, although not expressly decided.

STATE (ex rel. WOOD) v. SIMMONS HARDWARE CO.

(109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676, 1892.)

Statutes, Construction; Practice.

The managing officers of S, a domestic corporation, refused to answer under oath a letter of inquiry of the secretary of state sent to them in pursuance of section 6, Missouri anti-trust laws of 1889; whereupon a *quo warranto* proceeding was instituted against S to oust it from its corporate franchises on the ground that it was a member of several pools, trusts and conspiracies with other corporations and individuals to regulate the price of a certain commodity. The petition contained two distinct causes of action: (a) that the defendant was a member of an unlawful combination; (b) that the defendant violated the law by refusing to make answer, etc. The defendant answered denying the first cause of action. The right to demand an answer, constituting the second cause of action, was challenged upon several constitutional grounds. Thereupon the state moved for judgment on the answer. Upon this motion the only issue before the court was as to the second defense. In giving judgment for the defendant it was held that:

(1) Under a constitutional provision that "no person shall be compelled to testify against himself in a criminal cause," an officer of a corporation cannot be required to answer under oath an official inquiry touching a matter which may form the subject of a criminal accusation against him; (109 Mo. 125, 130)

(2) "Section 6 of the Act of 1889 'for the punishment of pools, trusts and conspiracies,' requiring some officer of every corporation to inform under oath, the secretary of state (under penalty of fine, imprisonment, etc.) whether such

company has violated said Act, is in conflict with the constitutional declaration that 'no person shall be compelled to testify against himself in a criminal cause,' and it is, therefore void;" (syl. 1)

(3) Whenever a legislative enactment plainly conflicts with the state constitution, it is the province of the courts, when properly invoked, to so declare it; (p. 125)

(4) Every reasonable intendment should be made to sustain a legislative enactment; (p. 126) and

(5) A motion for judgment on the pleadings is in the nature of a demurrer, and raises an issue of law only. (p. 123)

STATE (ex rel. WATSON) v. STANDARD OIL CO.

(49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. 1892.)

Corporations, Corporate Act; Limitations; Quo Warranto, Judgment.

Trust and supplemental agreements were entered into in January, 1882, by a number of persons, partnerships and corporations of various states. The original agreement divided the contracting parties into three classes. The first class consisted of *all* the stockholders and members of fourteen certain named corporations and limited partnerships, and such other corporations and partnerships as might join thereafter. Forty-four individuals, some acting individually as well as in a representative capacity, one estate and one partnership, and such other individuals as might thereafter become identified with them, constituted the second class. The third class was composed of a *portion* of stockholders and members of twenty-six certain named corporations and limited partnerships, and such individual stockholders and members of corporations and limited partnerships as might thereafter become interested in said agreement. By virtue of this agreement there were to be organized corporations under a designated name and with specified purposes in the states of Ohio, New York, Pennsylvania and New Jersey, and such other like corporations in other states and territories as thereafter became necessary. To these corporations there was to be transferred all the real and personal property of the corporations and limited partnerships embraced in class one, in consideration of stock of the respective new corporations; which stock was to be assigned to and held in trust by trustees appointed under said agreement in exchange for trust certificates. The individuals and parties mentioned in classes two and three agreed to transfer all

of their respective properties and assets for a like consideration. The agreement also provided for nine trustees, who were divided into three classes. Their most important duties were: to prepare trust certificates, which were to be issued only in a certain manner and for specified purposes; to receive all interest and dividends declared and paid upon any of the bonds, stocks and moneys held by them in trust, and to distribute all moneys received from such sources or from sales of trust property or otherwise, by declaring and paying dividends upon the standard trust certificates; to exercise general supervision over the affairs of the several Standard Oil Companies, and, as far as practicable, over the other companies or partnerships whose stock was held in trust; to elect as directors and officers thereof faithful and competent men; and to manage and direct the affairs of said companies in a manner they may deem most conducive to the best interests of the trust certificate holders. This board of trustees was required to have its principal office in the city of New York. Said agreement was to continue during the lives of the survivor and survivors of the trustees, and for twenty-one years thereafter; provided it was not terminated in a certain manner before that time. By the supplemental agreement made two days later the trustees were given discretionary power and authority to decide what companies should convey their properties and when the sales and transfers should take place, if at all, and until said trustees should so decide, each of said companies should remain in existence and retain its property and business, and the trustees should hold the stocks thereof in trust, as provided by the original trust agreement. The Standard Oil Company of Ohio became a party to the original agreement at the time it was made by the execution of it by all of its stockholders. In *quo warranto* proceedings brought against said company it was sought to oust its right to be a corporation on the ground that it had abused its corporate franchises by becoming a party to said agreement, which was claimed to be against public policy. The defendant answered but failed to deny the aver-

ment in the petition that all of the owners and holders of its capital stock, including all its officers and directors, signed said agreement. The principal defense interposed was that the Standard Oil Company of Ohio, as a corporation, was not a party to said agreement. Another defense to said action was that if the act in becoming a party to the agreement should be held that of the defendant, it was an act done and committed more than five years before the filing of the petition and that therefore the cause of action was barred. On a demurrer to this answer it was held that:

(1) "An agreement by which all, or a majority, of the stockholders of a corporation transfer their stocks to certain trustees, in consideration of the agreement of the stockholders of other companies and of the members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates to be issued by the trustees, equal at par to the par value of their stocks and interests; and by which the trustees are empowered, as apparent owners of the stock, to elect directors of the several companies, and thereby control their affairs in the interests of the trust so created; and are to receive all dividends declared by the several companies and limited partnerships, from which, as a common fund, dividends are to be paid by the trustees to the holders of the trust certificates,—tends to the creation of a monopoly, to control production as well as prices, and is against public policy;" (49 Ohio St. 138, syl. 3)

(2) A corporation can be managed only by its duly elected or appointed directors, in the interest of its own stockholders and conformably to the purpose for which it was created; (p. 185)

(3) Where all, or a majority, of a corporation's stockholders do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and busi-

ness of the company in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and is done by them in their individual capacity for the purpose of concealing their real object, such an act is regarded as the act of the corporation; (p. 184)

(4) So long as proper use is made of the fiction that a corporation is a legal entity apart from its shareholders, it is harmless and should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, was done simply as individuals and with respect to their interests as shareholders, or was done ostensibly as such but, as a matter of fact, to control the corporation and affect the transaction of its business, in the same manner as if the act had been clothed with all the formality of a corporate act; (p. 179)

(5) The legal entityship of a corporation is a mere fiction introduced for the convenience of the company in making contracts and acquiring property for corporate purposes; (p. 177)

(6) "All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts;" (p. 177)

(7) An action to forfeit a corporation's charter is barred, under section 6789, Rev. Stat., after the lapse of five years, whether the action might have been commenced by a prosecuting attorney or the attorney-general; (p. 187)

(8) A party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor, except where there is concealment or fraud on the part of the other party; (p. 188) and

(9) Where a corporation exercises *ultra vires* power by becoming, and continuing to be, a member of an unlawful combination, such corporation may be ousted from the exercise of such power in a *quo warranto* proceeding. (p. 188)

STATE v. STANDARD OIL CO.

(61 Neb. 28, 84 N. W. 413, 1900.)

Quo Warranto; Foreign Corporations; Self Incrimination.

This was an application by the attorney-general against the Standard Oil Company under section 394, Code Civ. Proc., for an order requiring the defendant company to permit inspection of its books and records to enable the state to obtain evidence of a violation of state anti-trust laws in support of a *quo warranto* proceeding brought against the company to forfeit its right to do business in Nebraska. In granting the application it was held that:

(1) A *quo warratno* proceeding under anti-trust law of 1899 is a civil remedy;

(2) *Quo warranto* being a civil remedy, a defendant corporation may be required to furnish evidence against itself;

(3) Irrespective of statute *quo warranto* is a proper proceeding to prevent a foreign corporation from doing business in a state contrary to its laws;

(4) Either injunction or *quo warranto* may be brought to prevent a foreign corporation from violating anti-trust law of 1899;

(5) A foreign corporation's privilege to do business is revocable whenever such corporation exercises its franchise in contravention of law; and

(6) Section 4 of 1899 anti-trust law is inoperative against citizens of other states because it constitutes unlawful discrimination.

STATE (ex inf. HADLEY) v. STANDARD OIL CO. OF INDIANA et al.

(— Mo. —, 91 S. W. 1062, 1906.)

Practice; Notice; Evidence.

The state proceeded by information in the nature of a *quo warranto* against a domestic corporation and two foreign companies domiciled in the state for business purposes, all of whom were charged to be members of an illegal trust or combination. The object of the information was to forfeit the franchises and licenses of these companies. The defendants answered. An issue of fact having been made, a special commissioner was appointed with power to subpoena witnesses with their books and papers, to hear evidence, and report his findings. The attorney-general thereupon presented to a court an application or petition setting forth the necessity for attendance of designated non-resident witnesses and the production of documentary evidence in their possession. Upon this application the attorneys for the defendant companies were by a court order notified and required to produce the witnesses named in the application at a specified time and place. Motions to vacate this order having been made, the cause came on for hearing on objections to the order. The validity of the order was sustained, the reviewing court holding that:

(1) Notice on a duly employed attorney is notice to his client, both under general principles and by virtue of sec. 8983, Rev. Stat. 1899, the force of the statute being spent as a means of notice in a prosecution under it;

(2) A foreign corporation is bound by laws existing at the time of its admission into the state for business;

(3) A corporation's ownership of another corporation's

capital stock is a material object for investigation in an anti-trust proceeding; and

(4) A referee, master in chancery, or any other officer having similar powers, should not report or refer intermediate matters to the court appointing him for its instruction, so that he might be controlled in rulings coming within his authority of appointment.

STATE v. VIRGINIA-CAROLINA CHEMICAL CO. et al.

(71 S. C. 544, 51 S. E. 455, 1905.)

Combinations; Contracts, Intention; Constitutional Law, Police Power; Statutes; Foreign Corporations, Conditions; Pleading.

Pursuant to a joint resolution of the General Assembly the attorney-general, in behalf of the state, filed a complaint against one foreign and seven domestic corporations, alleging, in substance, that the Virginia-Carolina Chemical Company was organized in New Jersey in 1895 by a combination of capitalists under the guise of a comprehensive charter, for the purpose of monopolizing the manufacture and sale of commercial fertilizers in South Carolina and adjoining states, with an authorized capital stock of $6,500,000; that in 1898 and 1899 its capital stock was increased to $24,000,000, and subsequently, it was believed, such capital stock was increased to $50,000,000; that in January, 1900, said company qualified in Virginia as a foreign corporation, and was doing business as such; that in pursuance of said unlawful scheme the Virginia-Carolina Chemical Company purchased the plants, property, good will and brands of seven South Carolina corporations engaged in a similar business, agreeing to pay therefor either in cash or in stock, the method pursued by said company being in some cases to acquire a controlling interest in the stock of the other companies, then electing its own officers or employees as officers of such corporations, conduct the business under an agreement or arrangement by which it controlled and dictated the prices of the products of such other companies until such time as it should choose to direct conveyances of property, plants, trade-marks,

brands and good will of such other companies, and in other cases direct at once such conveyance to it; that such selling companies were at the time of making the various sales independently engaged in the manufacture and sale of fertilizers in South Carolina, which business had become necessary to and was universally used by farmers of said state in the cultivation and production of their crops; that the Virginia-Carolina Chemical Company also acquired the stock or property of all the corporations engaged in the manufacture and sale of fertilizers in South Carolina except four, whose output constituted a very small percentage of the fertilizers manufactured and sold in said state; that said company, by purchase or lease, also acquired a large proportion of the available supply of phosphate territory in South Carolina and controlled a majority of the stock of the Southern Cotton Oil Company, claimed to be a gigantic New Jersey corporation engaged in the manufacture of cotton seed meal and other products which were extensively employed as a fertilizer; that said Virginia-Carolina Chemical Company also owned and controlled a majority of the corporations engaged in the manufacture of fertilizers in the states of Georgia, North Carolina and Virginia, and had thus practically secured itself against competition from outside of the state of South Carolina in its control of fertilizers therein; and that agreements not to engage thereafter in the manufacture and sale of fertilizers for a greater or less period within the state of South Carolina were taken by the said company from some or all of the directors and stockholders of the selling corporations. All of these transactions were charged to be contrary to the state anti-trust laws. The prayer for judgment was to declare void all the conveyances, sales and transfers, and order a return of the consideration for them; to appoint a receiver over the properties of all the domestic corporations; and to forfeit the Virginia-Carolina Chemical Company's license and enjoin it from doing business in the state. The Virginia-Carolina

Chemical Company interposed an oral demurrer to the complaint on the ground that the Act upon which it was based was unconstitutional. In affirmance of the judgment overruling this demurrer, it was held that:

(1) A corporation which acquires the property and good will of nearly all independent corporations engaged in the manufacture and sale of a certain commodity in a state, controls a majority of the stock in several corporations engaged in a similar business in three or four other adjoining states, and takes covenants from the officers and stockholders of the selling corporations not to engage thereafter in such businesses for a greater or less period within the state, is a combination which may lessen or affect the full and free competition of the articles thus monopolized; (71 S. C. 562)

(2) All contracts or arrangements made with a view to lessen, or which tend to lessen, full and free competition to an *unreasonable* extent are against public policy and within the anti-trust laws of 1897 and 1898; (p. 569)

(3) Separate lawful acts may become unlawful when forming part of an unlawful scheme; (p. 569)

(4) An intention to accomplish a certain result will be presumed where such result is the natural consequence that might reasonably have been expected; (p. 569)

(5) A state's police power can be invoked in defining, limiting, governing or destroying trusts, monopolies and combinations in restraint of trade; (p. 559)

(6) Section 1 of the fourteenth amendment to the Federal constitution does not interfere with the exercise of the police power of a state; (p. 559)

(7) A state has no power over importations of articles of commerce; (p. 561)

(8) The importation clause of 1897 anti-trust law is unconstitutional and separable from the other parts of the statute; (p. 561)

(9) A statute is not rendered unconstitutional by the presence therein of unconstitutional provisions when they

can be eliminated without affecting the rest of the statute; (p. 561)

(10) Provisions in a state statute that "every foreign corporation carrying on business or owning property in this state, shall be subject to laws as domestic corporations," and "that *all* charters shall be subject to amendment" are conditions which a foreign corporation accepts upon entering into such state for transaction of business therein, and become a part of its charter, privileges and limitations; (p. 560) and

(11) A complaint alleging, substantially, that all but four corporations independently engaged in the manufacture and sale of fertilizers within a state transferred all their property and good will to another corporation, the officers and stockholders of the selling companies entering into covenants with the vendee corporation not to engage thereafter in the manufacture and sale of fertilizers for a greater or less period within the state, that such vendee corporation acquired a large proportion of the phosphate lands of the state, that it controls a majority of the stock of a large manufacturer of a fertilizer ingredient, and that it owns and controls a majority of the corporations engaged in a similar business in adjoining states,—sets forth a good cause of action under 1897–1898 anti-trust laws. (p. 562)

STATE v. WILSON.

(— Kan. —, 84 Pac. 737, 1906.)

Notes; Consideration; Construction; Chattel Mortgage; False Pretenses.

In payment of the purchase price for a herd of cattle W & G executed two notes aggregating $13,366.80 and secured them by chattel mortgage to the commission company, through whom the purchase was made. Included in these notes was an item of $201 for commissions on the sale charged in accordance with a by-law of the Kansas City Live Stock Exchange fixing a minimum commission for services on buying or selling cattle for others. Nearly all of these cattle were subsequently sold by W on alleged presentation that they were clear of all encumbrance. The buyer, it was claimed, had to pay the mortgage or lose the cattle. In a criminal action against W for obtaining property under false pretenses he contended that the cattle were in fact unencumbered, because the notes and mortgage executed by himself and another were void under anti-trust laws, having been given to a member of a voluntary association known as the Kansas City Live Stock Exchange. This exchange was composed of persons and corporations engaged in the business of buying and selling live stock for themselves and for others. One of its purposes was the fixing and maintaining a minimum charge for commissions for services in buying and selling cattle for others. Not being permitted to introduce proof showing illegality in the taking of notes and mortgage, defendant was convicted. On a rehearing the judgment was reversed, the court holding that:

(1) 1897 anti-trust law was a complete substitute for and repealed the Act of 1891 by implication; (84 Pac. 378)

(2) An association of live stock commission merchants who practically control that business at an important market, fixing the minimum commission for members to charge for their services, is a restriction on commerce and on the full and free pursuit of a lawful business, and is within the prohibition of section 1, anti-trust law of 1897; (p. 738½)

(3) All contracts growing out of, and directly connected with, unlawful combinations, or evidencing acts done in promotion or in pursuance of the purposes of such organizations, are absolutely void and unenforcible; (p. 739½)

(4) "Where one of two considerations, or a distinct part of one consideration, is for any reason not capable of sustaining a contract, but is not otherwise obnoxious to the law, the courts universally recognize the situation as a partial failure of consideration, and permit a *pro tanto* recovery. But where one of two considerations, or a distinct part of one consideration, is unlawful, as being forbidden either by the statute or by the common law, the prevailing view is that the partial illegality taints the entire transaction and the contract itself is void;" (p. 740)

(5) No action or defense can be founded on a note part of the consideration of which is void; (p. 740, *et seq.*)

(6) Where notes secured by mortgage are void, the mortgage also is void; (p. 741½) and

(7) In a prosecution for obtaining property under false pretenses, to support a conviction, the actual falsity of the pretenses charged must be proved, and not that defendant believed such pretenses to be false. (p. 742)

STATE v. WITHERSPOON.

(115 Tenn. 138, 90 S. W. 852, 1906.)

Pleading; Indictment, Definiteness.

An indictment charged that on a certain date W did, in a certain county within the state, unlawfully, etc., as president, director and agent of a designated domestic company, carry out the stipulations, purposes, prices, rates and orders made by such company with a designated foreign corporation in furtherance of a conspiracy against trade entered into between said companies, consisting of an arrangement, contract, agreement, trust and combination, with a view to lessen, and which did lessen, full and free competition in the sale and manufacture of articles of domestic growth and of domestic raw material, and which tended to and did advance and control the price and cost of such product and articles to the consumer and buyer thereof. The terms of said agreement or arrangement, the particular articles involved, and the price of the articles which such arrangement tended to control and lessen or advance were not stated. On motion, the indictment was quashed on the grounds that it failed to sufficiently describe any particular violation of the statute upon which it was predicated, and that it was general and indefinite in its terms. This judgment was affirmed, the court holding that:

(1) Averments in an indictment must be sufficiently definite and direct so as to give defendant notice of the particular crime with which he is charged and its nature and must so describe the offense that a judgment or acquittal upon it could be relied on in another proceeding for the same

thing as a judgment of a former acquittal or conviction; (115 Tenn. pp. 144–147)

(2) Generally, an indictment for a statutory offense which substantially follows the statute is sufficient; (p. 143) and

(3) It is sufficient to charge in the indictment for conspiracy the existence and object of the conspiracy, without any statement of the means intended to be used in its accomplishment. (p. 143)

STOCKTON v. CENTRAL RAILROAD CO. OF NEW JERSEY et al.

(50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97, 1892.)

Statutes, Title; Corporations, Powers, Ultra Vires; Equity; Injunction.

In 1849 the Somerville and Easton Railroad Company and the Elizabethtown and Somerville Railroad Company were merged under special legislative enactment into the Central Railroad Company of New Jersey, whose authorized capital stock was $30,000,000, $22,500,000 of which was outstanding. It had an indebtedness upwards of $45,000,000, and had assets exceeding $67,000,000. In 1871 the Central Railroad leased the Lehigh and Susquehanna Railroad. It also caused the organization of the Lehigh and Wilkesbarre Coal Company, acquiring substantially all of its capital stock, and thereby becoming a considerable coal carrier from mines in which it was itself interested, as well as from those of other miners not having railroad facilities in and through the states of New Jersey and Pennsylvania to the New York harbor. The Philadelphia and Reading Railroad Company was a Pennsylvania corporation, with a capital stock of $40,000,000, and assets equalling an indebtedness of over $160,000,000. This company owned nearly the entire capital stock of the Reading Coal and Iron Company, which, in 1891, produced from its colliers about one-fifth of the total Pennsylvania anthracite coal. It also leased and operated the Lehigh Valley Railroad Company, which was a miner of coal and possessed a railroad running through the anthracite coal region of Pennsylvania, affording facilities for transportation of coal there mined to New Jersey markets and adjoining states. The Philadelphia and Reading Railroad Com-

pany also operated in New Jersey the Delaware and Bound Brook Railroad, connecting with railroads to the anthracite coal region. In November, 1890, the officers and employees of the Philadelphia and Reading Railroad Company, with others, organized the Port Reading Railroad Company under the general railroad law of New Jersey, with capital stock of $2,000,000, and the Port Reading Construction Company under the general corporation law of New Jersey, with a capital stock of $100,000. The business office of both companies was fixed at the office of the Philadelphia and Reading Railroad Company in the city of Philadelphia. Thereafter the Port Reading Construction Company contracted with the Port Reading Railroad Company to build its railroad for $1,500,000 of its mortgage bonds and all its capital stock, except a small number of shares, which had been subscribed for by its incorporators, the proceeds of which were paid to the state treasurer according to law. In January, 1892, the Port Reading Railroad Company, when only a few miles of a single track had been laid upon an unfinished road-bed, without rolling stock, or depots, and substantially all of its stock and bonds were in the hands of the Port Reading Construction Company, leased for nine hundred and ninety-nine years from the Central Railroad Company of New Jersey its entire railroad, together with the right to maintain and operate more than forty tributary railroads, which it controlled by leases or through the ownership of the majority of capital stock, the Central Railroad Company reserving to itself its office building in the City of New York and lands owned by it which were not adjacent to the railroad, or, if adjacent, not in railroad use. In consideration of this the Port Reading Railroad Company covenanted, among other things, to pay to the Central Railroad Company annually enough money to enable it to pay its fixed charges and seven per cent upon its capital stock issued or to be issued thereafter, under specified circumstances; to pay fifty per cent of the earnings in excess of the

fixed charges and seven per cent upon the capital stock, up to three per cent upon the outstanding capital stock of the Central; to pay taxes upon the capital stock and dividends of the Central; to keep the premises demised in repair; to insure the property; to save the Central harmless from all damages; to provide and maintain terminals, stations, etc.; to keep accounts; to perform all the Central's existing contracts; to procure traffic over the Lehigh and Susquehanna Railroad; to foster and increase traffic and its earnings; to furnish individual coal miners on the line of the Central's roads transportation for their coal without discrimination against them; and to charge as low rates for transportation as the rates charged for similar transportation by the Philadelphia and Reading Railroad Company. On the same day this lease was executed a tripartite agreement was made between the Central Railway Company, the Port Reading Railroad Company and the Philadelphia and Reading Railroad Company incorporating said lease and reciting that the lines operated by the three railroad companies were connected in New Jersey and Pennsylvania and formed continuous lines; that the Central Railroad Company was willing to lease to the Port Reading Company if the Philadelphia and Reading would guarantee the performance of the Port Reading's covenants in the proposed lease and would insure the increase of traffic that the lease contemplated, and that the Philadelphia and Reading was willing to guarantee the lease because of the advantage it would have in the interchange of traffic with it. It was thereupon agreed that the lease should be executed; that under the instruction of the Philadelphia and Reading Company's counsel the consent of the stockholders of the Central and Port Reading Companies to the lease should be procured; that immediate possession of the demised premises should be given; that the payments to be made by the Port Reading Company and the covenants to be performed by it were guaranteed by the Philadelphia and

Reading Company; "that the Port Reading Company should provide or procure, at Jersey City and in New York and Brooklyn and on the Arthur Kill, terminal facilities for the Philadelphia and Reading traffic, the Central Railroad Company having the privilege to provide such facilities, except at the Port Reading's terminal on the Arthur Kill, as betterments; that the traffic which would thereafter naturally go to the Central as its direct route should be secured to that road; that coal, naturally tributary to the Central, should go over it for as long a distance as possible; that coal, naturally tributary to the Philadelphia and Reading, which was destined to the New York harbor north of Elizabeth, should go over the Central's road, at least from Bound Brook Junction; that coal for delivery on line of the Central's road, from mines tributary to it, should go over the Central, or, in the event of its not going over the Central, that an equivalent for the loss of the freight rates should be credited in the Central's account; that traffic on the Easton and Amboy Railroad and upon other Lehigh Valley lines, destined to the Central terminals, should go over the Central, at least as far as from Roselle Junction to the terminal; that other traffic as then interchanged should be continued to be interchanged; that the Port Reading and the Philadelphia and Reading would maintain the present traffic of the Central and increase it; that the Philadelphia and Reading would put $2,000,000 of securities in trust to secure its performance of the agreement; that in case of a termination of the lease and agreement, the Central shall have an interest equal to the Reading in the Central New England and Western Railroad Company and in the Poughkeepsie Bridge Company, upon its paying to the Reading one-half its expenditure for the Reading's interest and assuming a due proportion of the obligations assumed by the Reading in securing that interest The agreement of guarantee and assurance of traffic was to continue as long as the lease should last, and in case

the lease should be forfeited the agreement should then be void." By an information filed against the Central Railroad Company of New Jersey, the Port Reading Railroad Company and the Philadelphia and Reading Railroad Company it was sought to have said lease and tripartite agreement declared to be *ultra vires* and void on the ground of public policy in that they tended to create a monopoly of the anthracite coal trade within the state by stifling competition between the contracting corporations, and thereby to increase the price of anthracite coal to the inhabitants of the state. A mandatory decree was prayed against the Port Reading Railroad Company for the surrender and return to the Central Railroad Company of its corporate franchises and property; and a restrictive decree was asked to perpetually restrain the Port Reading Railroad Company from thereafter controlling and intermeddling with such franchises and property, and to restrain the three corporate defendants from all future combinations that would arbitrarily increase, or tend to increase, the price of coal to the inhabitants of New Jersey. Upon a preliminary hearing of the information, answers and *ex parte* proofs, a preliminary writ was awarded, the court holding that:

(1) Act of May 2, 1885, prescribing that domestic railroad corporations shall not lease to foreign corporations without the sanction of law to be thereafter enacted, is constitutional; (50 N. J. Eq. 78)

(2) Unless expressly authorized by statute, a corporation has no power to lease or dispose of any of its franchises necessary in the performance of its obligations to the state; (p. 65)

(3) A corporation can exercise only such powers as are expressly given it by statute or necessarily implied; (p. 65)

(4) Act of March 11, 1880, amending the seventeenth section of an act entitled "An Act authorizing the formation of railroad corporations and to regulate the same," is suffi-

ciently broad in its terms to confer leasing power upon railroad corporations chartered by special law; (p. 66, *et seq.*)

(5) Where the meaning of a statute is doubtful the title may be referred to for assistance in its elucidation under a constitutional provision requiring that the object of the act shall be expressed in its title, and before a law will be declared unconstitutional it will be read in the light of its title to see if, within the fair bounds of that title, a reasonable interpretation may be given to it; (p. 68)

(6) The formation and regulation of railroads are subjects naturally and properly related to and connected with each other, and are germane to a single object when expressed in defining the title of an act; (p. 70)

(7) Under a constitutional provision that "every law shall embrace but one object, and that shall be expressed in the title," various subsidiary objects, properly connected and relating to one comprehensive subject, may be united in the same law; (pp. 69, 70)

(8) Equity concerns itself with substance and not mere outward form; (p. 73)

(9) In cases of excess in corporate powers the attorney-general has the election to proceed at law to forfeit the charter and franchises of the offending corporation, or apply in equity for a restraint of the excess; (p. 79)

(10) An attorney-general may have his injunction when the *ultra vires* act tends or is of a nature to produce public injury, without waiting until all the injury possible is in process of infliction; (p. 82) and

(11) Only when the court is satisfied of a real public injury, demanding a writ of injunction in the due protection of the public, will an injunction issue at the instance of the attorney-general to restrain an excess of corporate power. (p. 80)

NOTE.

This case turned on the right of a domestic railroad to lease practically all of its property to another domestic railroad, but substantially to a foreign railroad company, contrary to a statute prohibiting such leasing

STRAUS et al. v. AMERICAN PUBLISHERS' ASSOCIATION et al.

(177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, 1904.)

Statutes; Monopolies, Test.

In an action against the American Publishers' Association and others, the complaint, among other things, alleged that the plaintiffs were conducting a department store in New York City, having a department for the sale of books and general publications; that such department was one of the largest in the country, which was due to the cheaper price placed upon the books and publications under a system of cash sales; that in 1900, to meet a condition from which the publishing business was suffering, about ninety-five per cent in number and in extent of business of the publishers of all kinds of books and magazines formed the American Publishers' Association, which, upon its organization, and to prevent the cutting of prices on copyrighted books, adopted a resolution and entered into an agreement by which each member agreed that all copyrighted books published by him after May 1, 1901, should be published and sold at retail at net prices without any discount whatever; that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by a member or not, should be sold to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would sell books at wholesale to no one known to cut or sell at a lower figure than such net retail price, or whose name would be given by the association as one who cut such net prices; that thereafter the Publishers' Association caused to be organized the American Booksellers' Association, to co-operate in the alleged unlawful purpose of maintaining the price of copyrighted books and preventing competition in the sale thereof and in the supply of all

books, whether copyrighted or not; and that in effectuating said purpose the two associations had co-operated, and, because of their agreement, neither of them, nor any of their members, would sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books were copyrighted or not, or were not published by said American Publishers' Association or its members, who resold or was suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor would said association, nor any of its members, sell or supply any books whatever to any one who resold, or was suspected of reselling, such copyrighted books to any dealer who thereafter sold the same at less than such arbitrary net price. A demurrer to this complaint for want of sufficient facts to state a good cause of action was sustained. On appeal, the appellate division overruled the demurrer, and, on further appeal the court of appeals, in affirming the order of the appellate division sustaining the complaint and overruling the demurrer, held that:

(1) Where a trade agreement is lawful upon its face, but in the construction placed upon it by the parties to such an agreement an unlawful effect is given it, the agreement is within section 1, chapter 690, Laws 1899; and

(2) Whether an agreement is unlawful as creating a monopoly is not to be determined from its probable results, but from what may be done under it.

NOTE.

The entire court did not agree in the decision of this case. Four judges concurred in the prevailing opinion written by Chief Judge Parker, who wrote a concurring opinion in the Park Case. The dissenting opinions by two judges in the Straus Case were based solely on the Park Case. In the prevailing opinion of the Straus Case the Park Case is distinguished on the ground that the agreement in the Straus Case had the effect of discriminating against persons who were dealing in uncopyrighted publications.

SWIFT & CO. v. UNITED STATES.

(25 Sup. Ct. Rep. 276, 196 U. S. 375, 49 L. ed. 518, Ill. 1905.)

Lawful Acts of Unlawful Scheme, Intent; Interstate Commerce; Pleading; Injunction.

This was a proceeding in equity against a number of corporations, firms and individuals of different states. The bill, in substance, alleged the existence of a combination of dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states; to bid up prices for a few days in order to induce cattle men to send their stock to the stockyards; to fix prices at which they would sell, and, to that end, to restrict shipments of meat when necessary; to establish a uniform rule of credit to dealers, and to keep a blacklist; to make uniform and improper charges for cartage; and finally to get less than lawful rates from the railroads to the exclusion of competitors. The prayer was for an injunction, discovery of books and papers relating directly or indirectly to the purchases or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. A general demurrer to this bill was overruled and an injunction granted. On appeal, the decree overruling the demurrer was affirmed and the injunction was modified, the court holding that:

(1) Where a number of acts are bound together as parts of a single plan, and are insufficient in themselves to produce an unlawful result, the intent with which such acts are accomplished is a necessary element to make the entire scheme unlawful; (196 U. S. 396)

(2) Where acts in themselves are insufficient to produce

a prohibited result, but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen; (p. 396)

(3) Whether an act done with intent to produce an unlawful result is unlawful or constitutes an attempt depends upon proximity and degree; (p. 402)

(4) When cattle are sent for sale by a resident of one state, with the expectation that they will end their transit after purchase in another, and when, in effect, they do so, with only the interruption necessary to find a purchaser, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce; (pp. 398, 399)

(5) Where successive elements of a single, connected scheme are alleged in a bill, concluded with a general allegation of intent, such allegation colors and applies to all specific charges of the bill; (p. 395)

(6) Transactions of a domestic nature embraced in a bill based on the Sherman anti-trust law may be disregarded as immaterial; (p. 399) and

(7) General words in an injunctional writ ("or by any other method or device, the purpose and effect of which is," etc.) are improper, as defendants should be informed as accurately as the case permits what they are forbidden to do. (p. 401)

TEXAS & PACIFIC COAL CO. v. LAWSON.

(89 Tex. 394, 32 S. W. 871, 34 S. W. 919, 1896.)

Statutes; Appeal and Error.

In consideration of the tenant's conducting a saloon business at a certain place, furnishing monthly statements, and paying to the landlord two-thirds of the profits for the use of the premises, the landlord, a corporation, leased its saloon and agreed not to permit any other saloon to do business at such place during the leased period, to pay off its employees in checks instead of money, and to redeem such checks as the tenant might take in for the liquor sold. An action for rent having been brought under said lease, the defendant interposed various defenses and counterclaims and claimed damages for wrongful distress. A verdict and judgment were rendered in defendant's favor. On appeal, the question as to whether or not the lease was within Texas anti-trust law of 1889 came before the court for the first time. In reversing the judgment on the ground that the lease was within said statute it was held that:

(1) A contract made to carry out reasonable or unreasonable restrictions, and to prevent competition in trade, is within Texas anti-trust law of 1889; and

(2) The legality of a contract made the basis of an action and counterclaim is before a court of review although such legality is neither questioned in the trial court nor assigned as error on appeal.

TEXAS & PACIFIC RAILWAY CO. et al. v. SOUTHERN PACIFIC RAILWAY CO.

(41 La. Ann. 970, 6 So. 888, La. 1889.)

Pooling Agreement; Public Policy.

Collis P. Huntington, owning and controlling a system of six railroads and railroad companies, and Jay Gould, as owner and in control of a railway system consisting of a like number of railroads and railroad companies, entered into an original agreement in 1881 and a modified agreement in 1885 on behalf of the railroad companies represented by them respectively for the express object of adjusting certain differences then existing between their companies and to put an end to certain litigation arising therefrom. The agreement, however, contained a provision apportioning traffic between some of the railroads and providing for a mode of division and pooling of the earnings of such railroads in certain proportions. With one exception the systems of railroads thus made parties to the agreement were independent and competing. In an action against some of the railroad companies, based exclusively on the pooling provision of the agreement to recover excesses of earnings, it was contended, on behalf of the defendant, that the contract was in contravention of the Texas constitution against agreements restraining competition between railroads, etc., and that, if valid, the contract was terminated by the Interstate Commerce Act of April 3, 1887. These contentions were sustained and judgment was entered accordingly. In affirming said judgment it was held that:

(1) All contracts which have a tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to

public policy and incapable of enforcement; (41 La. Ann. 980)

(2) Where a contract, having a tendency to stifle competition or to create or foster a monopoly, is against public policy, the contract is unenforcible although executed, for a court, in refusing to enforce the stipulations of such a contract, will not go to the extent of decreeing its nullity but simply abstain from dealing with it or from discussing any of its effects as between the parties; (p. 983) and

(3) A confirmation by judgment or decree of an agreement of compromise has the force and effect of a thing adjudged only as to those matters which are covered by, and included in the compromise or agreement. (p. 976)

TEXAS STANDARD OIL-CO. et al. v. ADOUE et al.

(83 Tex. 650, 19 S. W. 274, 15 L. R. A. 598, 29 Am. St. Rep. 690, 1892.)

Restraint of Trade, Contracts, Test; Judicial Notice.

Four separate owners of cotton seed oil mills, being independent manufacturers and dealers in the purchase of cotton seed and its by-products in Texas, entered into an agreement whereby the minimum price of cotton seed was fixed and regulated with reference to certain places or localities, embracing the cotton producing territoy of said state, the purchase and shipment of seed from certain territory were prohibited, the purchase of seed was apportioned and regulated, and a fair and equitable division of seed cotton thereafter purchased was to be made by mutual consent, in consideration of a certain other party's guaranteeing a fixed net profit to said owners or producers of oil. The agreement was to continue in force for one year. An action having been brought upon this agreement to recover the guaranteed net prices, etc., the defendants demurred to the petition on the ground that the contract was in restraint of trade, unreasonable, contrary to public policy, and void. The trial court sustained the demurrer and dismissed the petition. In affirming this judgment, it was held that:

(1) A contract entered into by independent dealers and manufacturers in the same line of business for the purpose of preventing and having a natural tendency to prevent competition in too many localities, to reduce the price of raw materials, and to enhance the price of the manufactured products by artificial means, to the disadvantage and detriment of the public, is contrary to public policy and void; (83 Tex. 663)

(2) To render a contract void as against public policy, it is not necessary that it shall create a complete monopoly, but it

is sufficient if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract; (pp. 658, 659)

(3) In determining the illegality of a contract, the reasonableness of the restraint and its effect upon the interest of the public are proper tests; (p. 660) and

(4) Courts take judicial notice of the chief cities or commercial centers of the state, as well as the important producing regions thereof. (p. 658)

TRENTON POTTERIES CO. v. OLYPHANT et al.

(58 N. J. Eq. 508, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612, 1899.)

Contracts; Trade Restraint; Purchasing Competitor's Business.

The Trenton Potteries Company acquired, by purchase, the property and business of a majority of potteries in the United States, taking an agreement from each vendor restricting him from engaging in the business of manufacturing any pottery ware "within any state in the United States of America or within the District of Columbia, except in the state of Nevada and the Territory of Arizona, for the period of fifty years." Some of these vendors, having violated their agreement, the Potteries Company filed a bill in equity to enforce specific performance. The vice chancellor dismissed the bill as to all of the parties, upon the ground that the contracts in question were in restraint of trade, and therefore, illegal. As to some of the parties the bill was dismissed on other grounds. In reversing the decree of dismissal, it was held that:

(1) A contract between a seller and buyer, binding the seller to absolutely refrain from engaging in a certain business "within any state in the United States of America or within the District of Columbia, except in the state of Nevada and the Territory of Arizona, for the period of fifty years," binds the seller to a restraint in one or another of the separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable; (58 N. J. Eq. 516, 517)

(2) A restriction in a contract of sale of a business covering a whole state is not in general restraint of trade when it

is necessary for the reasonable protection of the purchaser's interest; (pp. 519, 520)

(3) The validity of restraint in a contract disposing of the entire business and good will of the seller is to be tested by the effect it has upon the business and good will sold and purchased and whether it reasonably protects the purchaser; (p. 519)

(4) "Contracts including distinct and separable obligations, some of which are legal and some prohibited, are enforceable as to such obligations as are legal;" (p. 519)

(5) Contracts are to be construed so as to give them validity, if such construction does no violence to their language; (p. 517)

(6) In the construction of a contract it is presumed that the contracting parties intend to make a valid contract; (p. 517)

(7) The presumption that an obligation entered into by more than one person is joint, and that a several responsibility will not arise except by words of severance, is inapplicable where words used in a contract will bear construction giving them a several force; (p. 512)

(8) "A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors;" (p. 524) and

(9) "A corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or, for a time at least, destroy competition." (pp. 524, 525)

TRUST COMPANY OF GEORGIA v. STATE.

(109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520, 1900.)

Constitutional Law, Corporations, Corporate Stock Ownership; Law and Fact, Competition; Injunction, Parties; Appeal and Error.

Pursuant to an executive order the attorney-general filed a petition for an injunction against the Trust Company of Georgia, the Atlanta Railway Company, and the Atlanta Railway and Power Company, showing the relative position of the defendant railways along certain streets of a designated city, and alleged that the operation of such railways was competitive in its nature; that one of the defendants, the Trust Company of Georgia, bought all of the stock and securities of the two railway companies for the purpose of causing their property to be conveyed to such railway company as would thereafter be organized; that such trust company also caused the election of all the officers in the two railway companies, and that the purchase of the stock and the election of the officers was done for the purpose, and had the effect, of destroying competition between the two railway companies at certain competing points. The petition prayed for an injunction to prevent the carrying out of such an alleged illegal combination and for the appointment of a receiver. Each of the defendants interposed a demurrer and an answer to the petition. Upon a hearing an injunction was granted, but the prayer for a receiver was denied. In reversing this judgment, it was held that:

(1) In the absence of a constitutional provision against the purchase of stock in other corporations, the legislature may confer such power upon corporations when not exercised for

the purpose of creating a monopoly or defeating competition, to the injury of the public; (109 Ga. 755, 756)

(2) Under Constitution, paragraph 4, section 2, article 4 (sec. 5800, Civ. Code), the General Assembly has no power to authorize any corporation to buy shares or stock in any other corporation of Georgia or any other state, when such purchase may have the effect, or is intended to have the effect, to defeat or lessen competition or to encourage monopoly, and the aforesaid section is applicable to *all* corporations, including railroads; (pp. 752, 753, 754)

(3) When, in the interpretation of a constitutional provision, there is any serious doubt as to what is meant by the words employed, the benefit should be given to the interpretation placed upon it by the legislative branch of the government and for a long period of years acted on by the people of the state in transactions involving important rights; (p. 753)

(4) Section 5800, Civil Code, providing that the General Assembly shall have no power to authorize any corporation to buy shares or stock in any other corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopolies, is declaratory of the common law and is self-active; (p. 751)

(5) Where a constitutional provision is declaratory of the common law, such provision is self-active; (p. 751)

(6) Whether or not two or more persons or corporations are competing is a question of fact the determination of which is governed by the fundamental principle as to whether there is such a creation of a monopoly or defeating of competition as would result in injury to the public; (p. 755)

(7) Where a state's property is involved or its public rights are prejudiced, the governor of the state, by the mere virtue of his office, may, upon a citizens' petition, order the attorney-general to institute action to preserve such property or rights; (p. 747)

(8) Whenever it is necessary, in the interest of the public, to prevent a threatened injury by a corporation, injunction proceedings may be brought by the state to restrain such cor-

poration from the exercise of such *ultra vires* powers; (pp. 747, 748) and

(9) When a lower court's decision, granting an interlocutory injunction, is based upon conflicting evidence, if there is sufficient testimony to sustain the judgment under the law, the court's discretion in granting or refusing an injunction will not be controlled, unless the court has misconceived or misapplied the law. (p. 760)

TURNER v. ABBOTT.

(94 S. W. 64, Tenn. 1906.)

Contracts; Trade Restraints.

As part of a contract of employment, a dentist agreed not to engage in dentistry where his employer was doing business, after leaving his employ. In an action to enforce this covenant, it was held that:

(1) A promise, in consideration of employment on a salary, not to carry on one's trade or profession in a particular place after termination of such employment, is valid; and

(2) Parol evidence is admissible to prove a contract which is partly in writing and partly verbal.

TUSCALOOSA ICE MFG. CO. v. WILLIAMS.

(127 Ala. 110, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125, 1900.)

Restraint of Trade; Contracts; Public Policy.

Previous to 1898, the only ice factories in the town of Tuscaloosa and the immediate surrounding territory were those of Williams and the Tuscaloosa Ice Manufacturing Company, said territory containing a sufficient population to market the output of both factories. In 1898 the Tuscaloosa Company and Williams entered into a contract whereby, in consideration of $875, to be paid by the Tuscaloosa Company to Williams in a certain manner, Williams agreed not to run his ice machine nor suffer it to be run for the term of five years. In an action by Williams against the Tuscaloosa Company for a breach of said contract, the defendant in effect pleaded that the object and effect of said contract was to wholly discontinue the manufacture of ice by plaintiff, to close down plaintiff's factory, to end all competition with defendant's ice trade, to leave defendant's plant the sole source of ice supply, and to give defendant complete control and monopoly of the ice market in the particular community involved, enabling it to increase the price thereof regardless of the cost of its manufacture; wherefore said contract was in restraint of trade and against public policy. To this plea there was a demurrer, which demurrer was sustained, and on defendant's declining to plead over, judgment was rendered for plaintiff. In reversing this judgment, it was held that:

(1) Where the sole purpose of a contract in restraint of trade is to eliminate competition and create a monopoly, and when the contract is not made as a part of the sale of a business, practice, trade or plant, the transaction involving

nothing but a bald covenant in restraint of trade for which there is no other consideration than the payment of money for the obligation itself, such a contract or covenant is void as against public policy; (127 Ala. 120)

(2) The nature of a contract and its tendency to injure the public's interest may render it unlawful as against public policy, however extended or circumscribed the business to which the contract refers may be, however broad or narrow may be the covenant in respect to time and place, and however exactly the covenant may respond in time and place to the exigencies of the business; (p. 117, *et seq.*) and

(3) It is against public policy to monopolize any commodity of common utility or of common consumption or use among the people, or even of considerable utility or consumption, whether it be one of the necessaries of life or not, and in certain localities ice is one of the common necessaries of life. (p. 123)

NOTE.

Weston Wooden-ware Ass'n v. Starkey et al. (84 Mich. 76, 1890) was decided upon the same principle as the foregoing case.

UNCKLES v. COLGATE et al.

(148 N. Y. 529, 43 N. E. 59, 1896.)

Equity Jurisdiction, In pari delicto; Contracts, Trust Agreement.

In October, 1887, an agreement was entered into for the formation of a lead trust by combining the interests of manufacturers and dealers in lead and its products throughout the country. The lead trust was capitalized at $89,447,600 or the equivalent of 894,476 shares, represented by "certificates of trust." In 1889 Unckles became a holder of certificates representing, in par value, 700 shares in this trust. In 1891 Unckles brought an action to restrain the trustees of the lead trust from disposing of property in their hands, or under their control, in pursuance of a certain scheme or plan for the dissolution of the trust and its merger into a new corporation, which had been adopted at a meeting of an association of certificate holders. In this action the plaintiff alleged his non-assent to the scheme because illegal and in violation of the provisions, etc., of the trust agreement and of his rights and privileges as a member of said association. A motion in that action for a preliminary injunction was denied, upon the ground that the scheme of reorganization did not appear to be unlawful in itself and that the plaintiff was not entitled to insist that a trust agreement which was illegal should be carried out or performed. Thereupon that action was discontinued. A reorganization of the lead trust interests in the form of a legal corporation was perfected and the National Lead Company was organized, to which the trustees transferred the assets and properties, etc., in their hands. In 1892, there having accumulated in the hands of the trustees over $3,000,000, for which they had never accounted,

Unckles brought an action to obtain the winding up of the affairs of the trust, for an accounting by the defendants, who were the trustees under the trust agreement, the appointment of a receiver and a distribution through the receiver of all moneys and of the proceeds of property which came into defendants' hands. A demurrer to this complaint having been sustained, the bill was dismissed for want of equity. In affirming this judgment, it was held that:

(1) Where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se,* courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant relief; (148 N. Y. 535)

(2) A party coming into equity must be innocent of any participation in a wrong as to which he seeks equitable intervention, or, if a participant, he must be able to sustain his appeal to the court by showing that, nevertheless, there is justice or some element of public policy in his demand which outweighs the fact of his participation; (p. 532)

(3) One who acquires an interest under an illegal agreement thereby becomes a participant in an unlawful scheme, and equity will leave him where it finds him; (p. 537)

(4) An agreement is not executory when its purpose is effected and no act remains to be done by the parties to it; (p. 538) and

(5) The disaffirmance of an illegal contract or transaction implies action on the part of *a contracting party* looking to withdrawal from the guilty scheme, a repudiation of all share in it, and a return of the property put into it. (p. 536)

UNITED STATES v. ARMOUR & CO. et al.

(142 Fed. 808, U. S. D. C., Ill. 1906.)

Immunity.

In March, 1904, the House of Representatives passed a resolution known as the "Martin Resolution," requiring the secretary of commerce and labor to investigate the packing business or beef industry and report. The month following, the commissioner of corporations entered upon an investigation of said industries by virtue of said resolution, examining witnesses and the books of various corporations, under the promise and assurance that any information thus obtained would be used by the department of justice, or for its purposes only, and that any other use would be guarded against, and that the witnesses were protected in that respect by the law as well as by the policy of the department. Upon the submission by the commissioner of corporations of his report to the president of the United States, said report was transmitted by the president to congress and published. This report was afterwards used by the United States attorney before a grand jury, which found an indictment charging numerous individuals and corporations connected with the beef industry with conspiring in restraint of trade and commerce among the states and with foreign nations, and with an attempt to monopolize such trade and commerce in violation of the Sherman anti-trust act. Various pleas in abatement were then filed, to which demurrers were interposed and sustained. The indictment was then demurred to and the demurrer overruled as to the conspiracy counts and sustained as to the counts charging monopoly. Afterwards, special pleas in bar were filed setting up, in substance, that by virtue of the "Martin Resolution" and also by virtue of the law creating the Bureau of Corporations, the commissioner of corporations had made an investigation into the defendants' business and into the matters and things alleged in the indictment, that the defendants, upon the

lawful requirement of the commissioner of corporations, had furnished evidence, documentary and otherwise, of and concerning the matters charged in the indictment, and that by reason of these facts, the corporations, as well as their agents and officers, were entitled to immunity from prosecution. Upon joining issue on these pleas, the case was tried by a jury. At the conclusion of the testimony, a motion was made on behalf of the defendants that the court direct the jury peremptorily to find the issues for the defendants. A cross-motion was made on behalf of the government that the court direct a verdict for the government. In sustaining the immunity pleas as to the individuals and denying them as to the corporations, and instructing the jury to find accordingly, it was held that:

(1) Officers and agents representing corporations cannot claim immunity for their corporations under the Appropriation Act of Feb. 25, 1903, chapter 755; (p. 817)

(2) The immunity granted by Act March 2, 1889 (25 Stat. at L. 858, c. 382), Act Feb. 10, 1891 (26 Stat. at L. 743, c. 128), Act Feb. 11, 1893 (27 Stat. at L. 443, c. 83, U. S. Comp. St. 1901, p. 3173) and Act Feb. 25, 1903, chapter 755 (2 Stat. at L. 904, U. S. Comp. St. Supp. 1905, p. 602) is broader than the constitutional privilege against self incrimination contained in the 5th amendment to the Federal Constitution, and said Acts make it unlawful for any one to refuse testimony lawfully required under or without subpœna and entitle a person to immunity whether under subpœna and oath or not, provided the witness does not volunteer to give testimony, but testifies only as to such matters as are lawfully demanded by an officer in good faith under a sense of legal compulsion; (pp. 818, 824)

(3) Legal compulsion does not depend upon subpœna or oath; (p. 825)

(4) It is not necessary to subpœna a person when he is present in court or within the verge of the court; (p. 824) and

(5) A witness may waive an oath, and an oath is waived by failing to insist on it or raise objection. (p. 825)

UNITED STATES v. COAL DEALERS' ASSOCIATION OF CALIFORNIA et al.

(85 Fed. 252, U. S. C. C., Cal. 1898.)

Interstate Commerce; Restraint of Trade; Equity, Parties; Injunction, Notice.

The Coal Dealers' Association of California, unincorporated, consisted of San Francisco and vicinity retail dealers in coal, and miners and shippers of coal who did not make a practice of selling coal at less than retail prices. Only such retail dealers were eligible to membership as owned and operated a yard, kept an office, and displayed a sign. This association adopted a constitution and by-laws under which severe penlties were inflicted upon members who violated any of their provisions. Embodied as part of the by-laws was an agreement made between the association and San Francisco wholesale coal dealers whereby both retail and wholesale prices of coal were fixed and regulated, the wholesale dealers agreeing not to sell at trade rates to any one not having an established yard, and at less than card rates to consumers, except in cases provided for by the agreement of the wholesale dealers. They also agreed to charge a fixed sum per ton additional over current trade rates to non-members, and consumers' rates to dealers who violated any of the association rules. A schedule of rates adopted specifically referred to coal mined in and shipped from other states and Canada. In granting an injunction upon a bill brought by the United States against said association and some of the wholesalers under Federal anti-trust law, it was held that:

(1) A contract or arrangement between retailers and wholesalers at a particular market, whereby the price of a commodity imported from other states is fixed and regulated,

and competition therein prevented, is an obstruction to interstate commerce, and within Federal anti-trust law; (pp. 264, 265)

(2) All restraints upon interstate trade or commerce, whether reasonable or unreasonable, are prohibited by the Federal anti-trust law; (p. 262)

(3) Under the rule that where the parties are numerous, some of them may be sued in a representative capacity, an unincorporated company may be made a party to a proceeding in equity as representing such parties; (p. 260)

(4) Under section 4, Federal anti-trust law, a restraining order may be issued without notice whenever the circumstances are such as would sanction the same to be done by the established usages of equity practice; (p. 259) and

(5) In very pressing cases, where the mischief sought to be prevented is serious and irremediable, or where the mere act of giving notice to the defendant of the intention to make the application might in itself be productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be completed before the time for making the application has arrived, courts will grant a restraining order without notice. (p. 259)

UNITED STATES v. E. C. KNIGHT CO. et al.

(156 U. S. 1, 39 L. ed. 325, Pa. 1895.)

Statutes; Interstate Commerce, Manufacturing.

In 1892 the American Sugar Refining Company contracted with all except one of the independent manufacturers and sellers of sugar, for the purchase of their stock, machinery and real estate; and as part of these purchases, a certain individual, on behalf of the American Sugar Refining Company, entered into separate contracts with each of these manufacturers and their shareholders for the purchase of their capital stock in exchange of the American Sugar Refining Company's capital stock. The purchasing company was a New Jersey corporation, organized for the purpose of purchasing, manufacturing, refining and selling sugar, molasses, etc., and doing all things incident thereto. All of the selling companies were organized under the laws of Pennsylvania, possessing powers similar to the New Jersey corporation. By this purchase the American Sugar Refining Company obtained control of about 98 per cent of the sugar refined and sold in the United States. The contracts between the American Sugar Refining Company and the stockholders of the various selling companies were made on different dates, and there appeared to be no understanding or concert of action between them respecting the sales. It appeared that the stockholders of each company acted independently of the stockholders of the other companies and in ignorance of what was being done by them. The contracts of sale in each instance left the sellers free to establish other refineries and continue the business if they saw fit to do so. In a bill by the United States against these selling companies it was charged that the contracts under which said purchases were made constituted a combination in restraint of trade, and that in entering into them the defendants combined

and conspired to restrain the trade and commerce in refined sugar in the several states and with foreign nations, contrary to the Act of Congress of July 2, 1890. The relief sought was the cancellation of these agreements; the redelivery of the stock to the parties respectively; an injunction against the further performance of the agreements; and general relief. The lower court dismissed the bill, and the circuit court of appeals affirmed the decree. In affirming the latter court it was held that:

(1) The Sherman anti-trust law confers no jurisdiction upon courts of the United States over contracts entered into for the purpose of creating a monopoly relating to property situated within different states but which does not constitute interstate commerce;

(2) The mere business of manufacturing is not interstate commerce;

(3) The manufacture of an article has only an indirect and secondary effect upon commerce, and is, therefore, a matter for state control and regulation;

(4) "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce;" and

(5) Only direct restraints upon interstate commerce are reached by the Federal anti-trust law.

NOTE.

The main reasons advanced by the dissenting opinion (Harlan, J.) were these: (a) the particular combination was a *direct* restraint upon commerce, because it restrained *interstate trade;* (b) while the manufacture of an article could not be interfered with by Congress, yet, when the article is manufactured, it becomes a subject of commerce; and (c) the purpose for, or intent with, which an article is manufactured *is controlling* in determining whether such article is or is not interstate commerce.

UNITED STATES v. JOINT TRAFFIC ASSOCIATION.

(171 U. S. 505, 43 L. ed. 259, N. Y. 1898.)

Statutes; Interstate Commerce.

Under the name of Joint Traffic Association a majority of the railroad companies (31), engaged in transportation between Chicago and the Atlantic coast, entered into an agreement whereby it was stipulated that such association should have jurisdiction over certain competitive traffic; that designated schedules of rates, fares and charges were thereafter to be adhered to, subject to such reasonable and fair changes as might be thereafter established; that the association affairs should be administered by different boards; that the managers of this association were to secure to each party to the agreement the equitable proportion of competitive traffic covered by it; that they were to decide and enforce the course to be pursued with connecting companies not parties to the agreement; that when necessary these managers were to determine the division of rates and fares between parties and non-parties to the agreement, keeping in view uniformity and the equities involved; that they were also to organize joint freight and passenger agencies to be so arranged as to give proper representation to each party to the agreement; that no railroad company which was a party to the agreement should be permitted to deviate from the established rates except in a certain manner; that such companies were not to maintain, except in certain cases, soliciting or contracting passenger or freight agencies; that the officials and employees of any of the parties to the agreement could be examined and an investigation made whenever deemed necessary by said managers; that any violation of the agreement was to be followed by a forfeiture of the offending com-

pany in a sum to be determined by the managers, not to exceed $5,000, or, if the gross receipts of the transaction involving a violation of the agreement exceeded $5,000, the offending party was, in the discretion of the managers, to forfeit a sum not exceeding such gross receipts; that the sums thus collected were to go to the payment of the expenses of the association; and that the agreement was to take effect January 1, 1896, and to continue in existence five years. In a bill by the United States it was charged that the foregoing agreement was made to prevent competition between the railroads who were parties to it, and that it unlawfully restrained trade and commerce in the several states and territories of the United States and unlawfully attempted to monopolize part of interstate commerce. All of the defendants answered substantially admitting the making of the contract but denying its invalidity. On hearing, the bill was dismissed. This decree was affirmed by the circuit court of appeals. In reversing both decrees it was held that:

(1) A contract or combination between competing railroad corporations entered into for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads, parties to the contract or combination, even though the rates and fares thus established are reasonable, is within the prohibition of the Federal anti-trust law; (171 U. S. 569) and

(2) Congress, in the exercise of its right to regulate commerce among the several states, or otherwise, has power to prohibit the making or entering into any contract or combination which restrains trade and commerce by shutting out the operation of the general law of competition. (p. 569)

UNITED STATES v. MacANDREWS & FORBES CO. et al.

(149 Fed. 823, 836 U. S. C. C., N. Y. 1906–1907.)

Interstate Commerce; Construction; Conspiracy; Parties to Actions; Pleading.

In 1903 the producers of licorice paste in the United States were the MacAndrews & Forbes Company, having factories in New York and New Jersey, the J. S. Young Company, doing business in Maryland, one Lewis, who operated a factory in Providence, Rhode Island, and Weaver & Sterry, engaged in business in New York; collectively, these four producers supplied almost the entire trade in licorice paste. December 8, 1903, by written agreement with the J. S. Young Company, the MacAndrews & Forbes Company, through ownership of the common stock of the Young Company and guaranteeing dividends on the preferred stock, became the owner of the Young Company's business. December 31, 1903, the Young Company and said Lewis entered into a written contract "whereby the latter agreed for the space of five years to limit his production to a fixed amount per annum, on which the Young Company guaranteed him a certain profit, one-fourth of which, however, was semiannually to flow back to the Young Company, while the profit on any excess production and sale by Lewis was to go entirely to the Young Company, which was also given power to regulate Lewis' sale price, provided that his minimum profit was not thereby destroyed." About the end of June, 1904, negotiations between the Young Company and Weaver & Sterry resulted in a verbal understanding to the effect that the uniform minimum price for paste should be fixed at a certain amount per pound after July 1; that no contracts for furnishing an indefinite quantity even at that price should be made; and that

such price agreement should continue until the close of 1906. Immediately after the last arrangement the price for licorice paste advanced, no one but factories affiliated with the American and Continental Tobacco Companies being permitted to purchase licorice paste from MacAndrews & Forbes Company. Others that were not so affiliated were required to make their purchases at certain prices and in a certain manner. An indictment containing three counts was thereupon brought against the MacAndrews & Forbes Company and the other manufacturers of licorice paste. The first count charged a combination in restraint of interstate trade; the second, conspiracy in restraint of interstate trade or commerce; and the third an attempt to monopolize a portion of interstate trade or commerce. All the counts were based upon the same allegations of fact. In overruling a demurrer to the indictment it was held that:

(1) There is a direct effect upon interstate commerce where the conduct with respect to an article concerns not only its manufacture, but operates upon the sale, transportation and delivery of the article throughout the United States by preventing or restricting its sale; (p. 834)

(2) Any given business scheme falls within the prohibition of the Sherman Act when its effect is to restrain interstate commerce, or create a monopoly, or its necessary operation tends to such restraint, and to deprive the public of the advantages of free competition; (p. 833)

(3) In determining the legality of a course of dealing, the law looks not to any particular act but at the aggregate effect of all the acts; (pp. 833, 834)

(4) Any restraint of interstate trade or commerce accomplished by the predetermined and concerted action of two or more individuals is a conspiracy under the Sherman Act, the element of conspiracy being the concerted action of two or more persons to accomplish an unlawful result by any means, or a lawful result by unlawful means; (p. 831)

(5) A corporation may be guilty of a conspiracy; (pp. 835, 836)

(6) A corporation and its agents or officers may be jointly guilty of the same conspiracy; (p. 832)

(7) Persons entering into a combination after its creation are equally guilty with those who formed the combination; (pp. 830, 831)

(8) Under the Sherman Act either one or several persons may be guilty of the charge of monopolizing or attempting to monopolize interstate commerce; (p. 836)

(9) An officer or agent of a corporation who personally participates with the corporation in a violation of the Sherman Act may be joined in an indictment against the corporation; (pp. 832, 833)

(10) All who personally aid or abet in the commission of a misdemeanor are indictable as principals; (p. 832)

(11) When an offense consists of a continued course of conduct and the thing done is definitely stated, it is not necessary to allege in an indictment the exact time of the commission of such an offense; (p. 830)

(12) All that is necessary to a charge of conspiracy under the Sherman Act is a description of the nature of the combination or conspiracy and the illegality of the object sought to be accomplished; (p. 831) and

(13) Duplicity in a count of an indictment does not exist when the offense is so pleaded that it will not require a jury to split the count and find the accused guilty of a part and not guilty of the balance. (p. 832)

NOTE.

After overruling the demurrer the case was tried and two of the defendants were found guilty on the first and third counts. A motion to set aside the verdict having been made, the motion was overruled and judgment rendered upon the verdict, the court holding that:

(a) If all the crimes charged against a given person are committed in accomplishing one unlawful act or in bringing about one unlawful desired result, it is improper to split up the transaction into as many parts as there are crimes incident to the fulfillment of the unlawful desire, and thus multiply punishment by multiplying indictments or counts;

(b) The test for discovering the identity of offenses is whether the crimes under consideration are in substance precisely the same, or of the same nature or species, or one crime is an ingredient of the other, neither identity of time nor of name will render offenses identical;

(c) Under the Sherman Act the offenses of being an unlawful combination and of being an unlawful monopoly are separate and distinct in substance and effect, justifying separate convictions and punishments; and

(d) The offense of constituting a combination in restraint of trade or commerce is complete when the combination is actually formed with the intent to bring about such restraint.

UNITED STATES v. PATTERSON et al.

(55 Fed. 605, 59 Fed. 280, U. S. C. C., Mass. 1893.)

Statutes; Conspiracy; Pleading; Indictment, Requisites; Surplusage, Demurrer.

John H. Patterson and others were indicted for a number of violations of the Federal anti-trust law, the indictment consisting of eighteen counts. In all of the counts the conspiracy charged was described as being a conspiracy to destroy or prevent the trade of third persons. The first ten counts were for engaging in a conspiracy in restraint of trade and commerce among the several states, in violation of the first section of the Act. The last eight counts were for a conspiracy to monopolize a part of the trade and commerce among the several states in violation of the second section of the Act. On demurrer, some of these counts were quashed and others sustained, the court holding that:

(1) Acts of violence and intimidation as the means to accomplish the general purpose of a conspiracy to engross, monopolize or grasp trade or commerce are indictable under the Federal anti-trust law; (55 Fed. 641)

(2) An indictment charging a violation of the Federal anti-trust law must allege that the various acts charged were committed for the purpose of restraining trade or commerce; (p. 641)

(3) All of the elements constituting a violation of the Federal anti-trust law must be specifically pleaded; (p. 638)

(4) Where a statute does not set out all of the elements of a crime, it is not sufficient in an indictment founded upon such statute to charge the offense merely in the words of the statute; (p. 638)

(5) The means by which it is sought to monopolize trade or commerce in violation of the Federal anti-trust law, must be set out in an indictment charging such offense; (p. 638)

(6) It is insufficient, in an indictment for conspiracy, to allege the means in general language, and if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it; (p. 638)

(7) "Surplusage in indictments cannot be reached by demurrer;" (59 Fed. 281) and

(8) A special demurrer must set out the specific language objected to, and ask the ruling of the court on that alone. (p. 282).

UNITED STATES v. STANDARD OIL CO. OF NEW JERSEY et al.

(152 Fed. 290, U. S. C. C., Mo. 1907.)

Sherman Act. sec. 5, Constitutionality; Constitutional Law, Congress, Power, Jurisdiction; Venue; Conspiracy, Coconspirators; Parties to Actions; Federal Practice.

It was substantially alleged in a bill by the United States that the Standard Oil Company of New Jersey, a corporation, seven individuals, and about seventy "subsidiary corporations" formed and were engaged in a conspiracy to restrain and monopolize commerce in petroleum and its products among the states and territories and with foreign nations; that in the execution of this conspiracy the individual defendants caused the control of all the subsidiary corporations and the ownership of a majority of the stock of many of them to be vested in the Standard Oil Company of New Jersey, a holding corporation, while the subsidiary corporations were the producers, refiners, traders and operators; that the individual defendants owned a majority of the stock of and controlled the holding corporation, and, through it, the subsidiary corporations; that the defendants divided the territory of the United States into districts, permitting only certain defendants to sell the products of petroleum within the specified districts; that two of these subsidiary companies, the Waters-Pierce Oil Company, a Missouri corporation, and the Standard Oil Company of Indiana, were carrying out an agreement whereby the territory in the state of Missouri and other territory in the Southwest was divided between them and neither corporation was permitted to market its products of petroleum in the district of the other; and that the Waters-Pierce Oil Company and the Galena Signal Oil Company, in combination

with the other defendants, restrained and monopolized interstate commerce in lubricating oil used on railroads. The prayer of the bill was to enjoin the continuation of said monopoly, and for other equitable relief. The individual defendants, the Standard Oil Copmany of New Jersef and nearly all of the subsidiary corporations, except the Waters-Pierce Oil Company were not inhabitants of and could not be found in the district where the bill was filed. Immediately after the filing of the bill, and before subpœna had been issued or served upon the resident defendants, the United States presented its petition that the nonresident defendants should be brought in, which was granted. Some of the defendants appeared specially to vacate the order and to quash service of the subpœnas upon them on the grounds; (a) that the court was without jurisdiction to make the order; (b) that it was prematurely and irregularly made; and (c) that the ends of justice did not require that the nonresident defendants should be brought into the suit. In denying the motion it was held that:

(1) Section 5, Act July 2, 1890, authorizing the making of additional parties, is constitutional and gives a court authority to bring in such parties whenever in its opinion the ends of justice require such action, regardless of whether the parties sought might become principal defendants and are not indispensable parties to the action; (pp. 293, 294)

(2) By virtue of article 3, sections 1 and 2, Federal Constitution, congress has authority to confer jurisdiction upon all Federal courts and power to summon all necessary parties to the adjudication of the controversies involved, wherever such parties are residing or are found within the dominion of the United States; (pp. 292, 293)

(3) Section 1 of the Judiciary Acts which provides that "no civil suit shall be brought before either of said courts (the circuit and district courts) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant" is inapplicable to instances in

which exclusive jurisdiction over particular cases, or classes of cases, is created and conferred upon the courts of the United States by special acts of Congress; (p. 293)

(4) "One who learns of a conspiracy after it is formed, and then joins it, or knowingly aids in the execution of its scheme, and shares in its profits, becomes from that time as much a co-conspirator as if he was one of those who originally designed it and put it in operation;" (p. 294)

(5) Where the conspiracy involved extends throughout the United States and nothing less than a permanent injunction against its continuance will be adequate relief, the ends of justice require that nonresident co-conspirators should be made parties to a bill to enjoin such conspiracy; (p. 296)

(6) When properly invoked it is the duty of a court to summon not only every indispensable party, but every necessary party within reach of its process, and who ought to be made a party to the suit in order that the court may finally adjudicate the whole matter, although if he were not amenable to process, final justice might be administered between the other parties without his presence; (p. 296)

(7) A petition for an order under section 5, Sherman Act, to authorize the issuance of a subpœna to nonresident defendants is presented in proper time and not prematurely when filed before subpœna has been issued or served upon resident defendants; (p. 295) and

(8) Where a conspiracy in restraint of trade involves resident and nonresident defendants, and it is desired to make the nonresident defendants parties to the bill, the proper method is to make all of the alleged conspirators defendants to the bill, to set forth the history and existence of the conspiracy and the connection of each defendant therewith, and immediately upon the filing of the bill to present a petition showing the places where the nonresident defendants may be served with process and praying that they be summoned. (p. 295)

UNITED STATES v. TRANS-MISSOURI FREIGHT ASSOCIATION et al.

(166 U. S. 290, 41 L. ed. 1007, Kan. 1897.)

Statutes; Restraint of Trade; Definitions; Contracts; Public Policy; Practice; Pleading; Proof; Injunction; Appeal and Error.

Eighteen competing railway companies, in 1889, formed the Trans-Missouri Freight Association, and, as members thereof, entered into an agreement giving the association control of all competitive traffic within a designated and combined territory, appointing a board consisting of several persons, one from each of the railway companies, and conferring upon such association the power to establish and maintain rules, regulations and rates on all competitive traffic, through and local, and to punish by fine such members as failed to live up to established schedules. In 1892, in a bill by the government against this association and its members, the general character and effect of the agreement was alleged, and it was charged that notwithstanding the passage and going into effect of Act of July 2, 1890, the defendants continued to operate under said agreement. The bill prayed that the contract be declared illegal; that the association be dissolved; that the defendants be prohibited from further agreeing and acting together in maintaining the rules and regulations for carrying freight, etc.; that they be enjoined from continuing in the combination, and that they be enjoined from continuing to monopolize or attempting to monopolize freight and traffic in the different states and territories of the United States. Three of the defendants answered, disclaiming their membership in such association. The other fifteen defendants admitted the making of the agreement, but denied that it

was entered into for the illegal purposes charged in the bill, claiming to have a right, under the interstate commerce act, to combine and agree for the purpose of establishing and maintaining reasonable uniform rates. At a hearing upon the bill and answers the bill was dismissed. On appeal to the circuit court of appeals the lower court was affirmed. In reversing both judgments it was held that:

(1) A contract between competing common carriers by railroads which affects traffic rates for interstate transportation of persons and property is within Federal anti-trust law; (166 U. S. 312, 327)

(2) All agreements and combinations in restraint of trade or commerce, whether reasonable or otherwise, are within the Federal anti-trust law; (pp. 327, 341)

(3) The word "every" in the Federal anti-trust law means "any;" (p. 312)

(4) The phrase "contract in restraint of trade" includes all contracts, whether reasonable or unreasonable; (p. 328)

(5) The validity of an agreement is a question of law, to be determined from its meaning and effect, disregarding the intent with which it was entered into; (p. 341)

(6) The Federal anti-trust law does not repeal, by implication or otherwise, any of the provisions of the interstate commerce act; (p. 315)

(7) A government's public policy is to be found in its statutes, and, when these are silent, in the decisions of the courts and the constant practice of the government officials; (p. 340)

(8) Legislative or congressional debates are improper sources of information from which to discover the meaning of the language of the statute; (p. 318)

(9) Although an agreement might have been legal at the time it was entered into, if, after the passage of a prohibitive law, the objects and purposes of such agreement are continued and carried out, such a law is applicable to this class of agreements without giving it a retroactive effect; (p. 342)

(10) Under section 4 of the Federal anti-trust law, the United States courts have jurisdiction to grant injunctive relief to protect interstate commerce; (p. 342)

(11) A bill, in order to confer appellate jurisdiction upon the supreme court, need not state, in so many words, that a certain amount is in controversy, all that is necessary for this purpose is that the statutory amount shall, as a matter of fact, be in controversy, which fact may be shown by affidavit or in some other satisfactory manner after appeal is taken; (p. 310)

(12) The intent with which an agreement claimed to be in restraint of trade or commerce was entered into is not a necessary fact to be alleged; (p. 341)

(13) When an agreement on its face appears to be in restraint of trade or commerce, and has that effect, the fact that it is in such restraint need not be proved; (p. 341)

(14) Where an unlawful contract is carried out through an association and the object of a bill is to declare such an arrangement or contract unlawful, to dissolve the association, and to restrain the defendants from continuing in a like combination, a dissolution of such association alone, pending an appeal, will not prevent the appellate court from assuming jurisdiction; (p. 309) and

(15) While generally equity will not interfere simply to restrain a possible future violation of law, yet, where parties are acting under an illegal agreement and there is no adequate remedy at law and the jurisdiction of a court has attached by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of a court is not ousted by the mere formal abandonment of such contract subsequent to the entry of the judgment in the suit. (p. 309)

NOTE.

The dissenting opinion of White, J., concurred in by Field, Gray and Shiras, JJ., is based on two propositions:

First: That only such contracts as *unreasonably* restrain trade are violative of the Federal law. From a study of this

opinion it will be seen that the dissent, in reality, is from the broad language used by the majority opinion and not from the doctrine announced and applied to the particular facts of the case. When so applied, the majority decision says that all contracts, whether reasonable or unreasonable, that in any way directly restrain trade or commerce are within the Federal anti-trust law. The crucial test is whether the contract directly restrains interstate commerce by preventing competition, and not so much as to whether the contract is reasonable or unreasonable. The dissenting opinion fails to recognize this distinction and assumes general propositions that might arise in the future but in no way warranted by the facts in the case.

Second: That the Federal anti-trust law is inapplicable to contracts made by railroad common carriers with reference to uniform rates, etc., on the hypothesis that such contracts are expressly or impliedly sanctioned by the interstate commerce act. Here again the dissent applies itself to generalities, and not to the specific facts of the case.

The main opinion does not say that the trust act repeals or amends the commerce act, but that the trust act includes common carriers by railroads when they combine to prevent competition in interstate rates; in fact, under the majority, as well as the dissenting opinion, both acts are reconciled, each operating within its own sphere. The departure by the dissenting opinion from the majority opinion is on the erroneous assumption that contracts by railroads to establish uniform rates and prevent competition are sanctioned by the interstate commerce act, and therefore are not prohibited by the trust act. The difficulty with the dissenting opinion is that it characterizes the particular contract as one "to secure a uniform classification of freight and to prevent secret changes of the published rates, * * * to secure just and fair dealings between each other, sanctioned by the act to regulate interstate commerce;" whereas, as a matter of fact, and so determined by the majority court, this agreement was such as effectively and directly prevented competition in interstate commerce between the parties entering into it.

UNITED STATES CONSOLIDATED SEEDED RAISIN CO. v. GRIFFIN & SKELLEY CO.

(126 Fed. 364, U. S. C. C. A., Cal. 1903.)

Patents, Contracts; Practice.

In 1900 a number of patentees of certain patents covering the whole art of seeding raisins by machinery entered into a contract, pool or combination. By this contract all of the patent owners agreed to assign their patents to the United States Consolidated Seeded Raisin Company "for mutual protection and assistance," the latter agreeing to protect the several inventions in the interest of all by the institution and defense of suits and to grant licenses under said patents subject to the supervision and control of an advisory committee, which was authorized to determine to whom and the terms and conditions upon which such licenses should be granted, and to pay and distribute royalties to said owners in certain proportions. In carrying out the foregoing agreement, all of the patents therein involved were assigned to the United States Consolidated Seeded Raisin Company, which company issued uniform licenses covering the entire United States and continuing in force during the life of the patents, the licenses providing for the payment of certain royalties, for the leasing of machines, etc., at actual cost, and for the exclusive use of such machines by the licensees, and prohibiting the purchase and sale of raisins treated by any other machines or processes than those covered by the licenses. One of the licensees having broken his license contract in various alleged ways, an action for damages was brought against him by said licensor. The defendant pleaded rescission of license on the ground of false representations and failure of consideration. Upon these issues there was a trial by a jury, but the case was taken from the jury on the ground that the contract had the tendency and effect of creating a monopoly and was

therefore void as against section 1673 Civil Code and against public policy. In reversing the lower court it was held that:

(1) The owner or owners of patents may impose any condition upon the assignee or licensee with reference to his or their patents, restricting the terms and conditions upon which the patented article may be manufactured or used and the prices to be demanded therefor in order to keep up the monopoly of the patent or patents, without rendering such condition void as against public policy or as obnoxious to the provisions of the Sherman anti-trust act; (p. 369)

(2) A contract by the owner or owners of patents imposing conditions upon the assignee or licensee restricting the terms upon which the article shall be manufactured or used under the patents regulating it, and the prices to be demanded therefor, in order to keep up the monopoly of the patent, is not violative of section 1673 Civil Code of California, declaring void every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind, because provisions of a state law cannot affect rights acquired under a patent of the United States; (pp. 369, 370)

(3) Agreements in restraint of trade, whether under seal or not, are divisible, and, when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade while the other is not, the court will give effect to the latter and will not hold the agreement to be void altogether; (p. 370)

(4) Provisions in a contract requiring vigorous prosecution of infringers of letters patent, so as to prevent as far as possible an unlawful interference with the business and rights of the patentees, their assignees or licensees, is valid and not objectionable as a provision for oppressive litigation against third parties; (pp. 370, 371) and

(5) Although a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting the contract cannot be declared illegal by the court as a matter of law.

VULCAN POWDER CO. v. HERCULES POWDER CO. et al.

(96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242, 1892.)

Restraint of Trade; Patent Owners' Combination; Illegal Contracts; Jurisdiction, Accounting.

Five powder companies entered into a contract providing that neither of the parties thereto should make any shipment of dynamite powder to any part of the United States east of certain boundaries, regulating the manufacture and sale of powder in the territory west of those boundaries under certain specified restrictions, authorizing a standing committee to fix prices, regulate the manufacturing cost, and impose fines for violations of the contract, and providing for a termination of the contract if any other party or parties should begin to manufacture and sell dynamite in competition with the parties to the contract. Each of the parties was required by the contract to make periodical verified reports to the standing committee of the amount of dynamite sold and had the right to make quarterly examinations of the books of account, papers, etc., of each of the other parties. One of the parties having made false reports of the amount of dynamite sold by it and refusing to permit an examination of its books, an action was brought against it to compel such examination and for judgment for such amount of money as might be found due according to the provisions of said contract. Upon demurrer to the complaint on the ground that the contract was in restraint of trade, the demurrer was sustained and judgment entered accordingly. In affirming this judgment it was held that:

(1) A contract entered into by several independent manufacturers and dealers of and in a commodity for the purpose

of controlling its manufacture and sale and preventing competition is violative of section 1673, Civil Code, declaring void "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind;" (96 Cal. 513)

(2) While a trader may sell a patent right, or a secret in his trade or art, and restrain himself generally from the use of it, or from other acts which would lessen the value of the patent or secret sold, several persons or companies cannot legally enter into a business combination to control the manufacture or sale or price of a commodity, merely because some of them have letters patent for certain grades of that commodity; (p. 515)

(3) No cause of action arises out of an illegal contract, and a court will leave the parties to such a contract exactly where it finds them, the maxim being *ex turpi causa non oritur actio;* p. 517) and

(4) Where money or other property has accumulated under an illegal contract, equity will not refuse to dispose of such property as between the parties, unless the provisions sought to be enforced by the action are the very means established by the parties to the contract for the purpose of making sure their illegal agreements, and are inseparably interwoven with the whole texture of the contract and partake of its general character. (p. 517)

WALSH v. ASSOCIATION OF MASTER PLUMBERS OF ST. LOUIS, MO. et al.

(97 Mo. App. 280, 71 S. W. 455, 1902.)

Statutes; Injunction, Equity.

In this case the petition charged that over 300 of St. Louis master plumbers formed the Master Plumbers' Association; that as members thereof they agreed with all the manufacturers and dealers in plumbers' supplies not to sell plumbers' supplies in the city of St. Louis, except to members of such association; that such agreement was entered into solely for the purpose of limiting competition in and raising and controlling prices of plumbers' supplies in said city; that any breach of this agreement subjected the offending party to a severe penalty; that by reason of the petitioner not being a member of such association and his refusal to become one, he was unable to procure plumbers' supplies in said city; and that the action taken by the various supply houses under said agreement and the members of said association caused and was causing him considerable injury, and was preventing him from carrying on his business. The petition sought a temporary injunction against all of the defendants, an adjudication that the association was illegal, its dissolution, and general relief. On a special demurrer, the same was sustained and the petition was dismissed. In reversing this judgment it was held that:

(1) An agreement between nearly all retailers and all wholesalers in a locality, to fix prices and limit production in the commodity which they handle, is prohibited by section 8978, article 2, chapter 143, Revised Statutes 1899;

(2) Equity has jurisdiction to grant injunctive relief from a continuing civil wrong caused by an illegal conspiracy; (97 Mo. App. 293) and

(3) The remedy provided by section 8979, article 2, chapter 143, Revised Statutes 1899, taken in connection with section 8932, is cumulative and exclusive. (p. 291)

WALTER A. WOOD MOWING & REAPING CO. v. GREENWOOD HARDWARE CO.

(75 S. C. 378, 55 S. E. 973, 9 L. R. A. [N. S.] 501, 1906.)

Exclusive Agency Contracts.

A foreign implement manufacturer, a corporation, entered into a contract with a local dealer in South Carolina for the sale of implements imported into the state, whereby the dealer agreed to sell such articles for use in a certain vicinity only, to canvass the same for purchasers, and not to accept a similar agency during the term of the contract; and the manufacturer agreed to manufacture and sell implements to this dealer and to use reasonable diligence to prevent other agents from making sales of the same in such territory. The manufacturer having brought an action against the dealer under said contract for the recovery of a certain amount claimed to be due it from the dealer, the principal defense was that the contract was illegal as being in restraint of trade and void under section 2845, Civil Code 1902. A demurrer to this defense having been sustained the defendant appealed. In affirming the order or judgment of the lower court, it was held that:

(1) An agreement between a manufacturer or wholesaler and a dealer for the exclusive purchase and re-sale of all of the former's goods, during a limited time and within a specified territory, is only in partial restraint of trade and is reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly within the meaning of section 2845, Civil Code 1902; (75 S. C. 385)

(2) Contracts, etc., coming within the prohibition of section 2845, Civil Code 1902, are only those made with a view to lessening, or which tend to lessen full and free competition to an unreasonable extent; (p. 382)

(3) "In determining whether a particular contract falls within the inhibition of the statute, the court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as part of a scheme to destroy or impede competition and control supply and prices;" (p. 383)

(4) Every case, under the provisions of said statute, must be controlled by its own peculiar facts and circumstances; (p. 384)

(5) Under the common law, an agreement between a manufacturer or wholesaler and a dealer for the exclusive sale of all of the former's goods during a limited period and within a specified territory is not in unreasonable restraint of trade; (p. 386) and

(6) The validity of a contract in partial restraint of trade under the common law is to be determined by whether it affords only a fair protection to the interests of the party in whose favor it is made, without being so large in its operations as to interfere with the interests of the public. (p. 386)

NOTE.

Justice Gary dissented. His dissent was based principally on the ground that, in his opinion, the contract under consideration, besides showing that the parties entered into it with a view to lessening full and free competition to an unreasonable extent, naturally tended to bring about such a result.

WATERS-PIERCE OIL CO. v. STATE.

(103 S. W. 836, 105 S. W. 851, Tex. Civ. App. 1907.)

Courts; Concurrent Jurisdiction; Interference; Appeal and Error, Supersedeas, Effect; Statutes; Receiverships, State and Federal.

On the 22d of September, 1906, the state of Texas instituted proceedings in Travis County, Texas, against the Waters-Pierce Oil Company, a foreign corporation, to recover penalties and to oust it from the state. On June 1, 1907, a trial resulted in a verdict and judgment against the defendant for $1,623,900, and cancellation of the defendant's license to do business within the state. On the same day, the state applied for the appointment of a receiver and for an injunction to restrain the defendant from removing any of its property situated within the state, claiming a lien upon such property under the Act of April 11, 1907, for the satisfaction of said judgment. A temporary restraining order was then issued, and the appointment of a receiver was set down for the 8th and continued to the 10th of June, 1907. On that day, the court announced that E would be appointed receiver, giving the defendant forty-eight hours in which to object. On the 13th of June, 1907, no objection having been made, the order of appointment of receiver was made final and the temporary injunction continued. On the 15th of June, 1907, the foregoing order was amended, an appeal allowed the defendant, and the amount of bond fixed. A motion for a new trial was then made and overruled. Thereupon, the defendant executed a supersedeas appeal bond from the judgment of penalties and cancellation of the permit. On the 19th of June, 1907, the receiver accepted the trust and qualified. On the same day, the defendant perfected its appeal from the order appointing the receiver. On this day, after all of the foregoing pro-

ceedings were had in the state courts, one of the defendant's stockholders made application to a United States circuit court for the appointment of a receiver of all of the defendant's property situated in Texas. D was thereupon appointed receiver and qualified and took possession of such property. The state of Texas then petitioned the court of civil appeals of Texas for relief against the Federal receiver, substantially setting forth the foregoing facts and praying for a mandatory injunction against the Federal receiver to forthwith cease acting as receiver and to turn over the possession, control and management of the property, etc., to the receiver to be appointed by said court, and for an order authorizing the receiver to be thus appointed to take either alone or in conjunction with the state of Texas, all necessary steps and to file and prosecute in the Federal receivership proceedings any and all suits, pleas, and applications which he and the attorneys for the state might consider proper and expedient to procure the surrender of all of said property from D, the Federal receiver, or other receiver that might be appointed to act with him or as his successor. At the hearing of this application, it appeared that the Federal receiver was in possession of the defendant's property, while the state receiver was never in possession of the same; that the order of appointment of the Federal receiver confined itself solely to property within the state of Texas; and that the decree appointing the Federal receiver was very comprehensive, permitting a final and complete disposition of all said defendant's property. In directing the state receiver, the state and its attorneys, to appear before the Federal court and there by suit, pleas, and applications urge and insist upon the rights of the state to, and jurisdiction of the state courts over, the property in controversy and to ask for such orders, decrees and judgments as they might deem necessary and proper, and to appeal and perfect such appeals and writs of error as they might deem proper and necessary, it was held that:

(1) When the power of a court is first invoked to seize and administer property, its jurisdiction is exclusive, and no other court of concurrent jurisdiction can materially disturb or hinder the former in the exercise of its authority and jurisdiction over the *res*, and as between state and Federal courts, the right to non-interference is absolute and does not depend upon mere convenience, discretion or comity; (103 S. W. 839)

(2) This rule is applicable to suits brought to enforce liens against specific property, to marshal assets, to administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected, and is not restricted in its application to cases where proprty has been actually seized under judicial process before a second suit is instituted in another court; (p. 839½)

(3) To determine the existence of a clash of jurisdictions between courts of concurrent jurisdiction, these questions must be taken into consideration: (a) Was the procedure and relief in the trial court wholly or *quasi in rem*, and if the latter, at what stage of the proceeding did the jurisdiction attach. (b) Does the particular action of the second or co-ordinate court materially interfere with the exercise of jurisdiction by the first court; (p. 840)

(4) When the provisions (secs. 1, 2, and 3) of the Act of April 11, 1907, are invoked to subject property of a corporation to the jurisdiction of a court upon judgment for penalties and decree for forfeiture of its permit in order that an ultimate benefit may result to the state from the judgment rendered, a seizure of the property through a receiver is absolutely necessary and the proceeding under these provisions is *in rem;* (p. 841½)

(5) Upon the institution of a proceeding to enforce the provisions (secs. 1, 2, and 3) of the Act of April 11, 1907, the jurisdiction of a court completely attaches not only to the person of the defendant, but to the thing that the law made triable for the consequences of the illegal acts denounced by the statutes upon which the suit is based; (p. 841½)

(6) The constitutionality of the Act of April 11, 1907, was not questioned and was therefore not involved in the foregoing proceeding; (p. 841)

(7) When upon a bill for a receiver service is had, or there is the equivalent by appearance, the jurisdiction of the court will, under the doctrine of relation, after order made, commence from the time of the filing of the bill for appointment, although no possession has been taken by the receiver of the property sought to be administered by the court; (p. 841½)

(8) Where a bill in equity brings under the direct control of the court all the property and estate of the defendants or of a certain named defendant, or certain designated property of all or either of the defendants, to be administered for the benefit of all entitled to share in the fruits of litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and the service of the process is an equitable levy on the property; (p. 842)

(9) An appeal by supersedeas merely suspends the enforcement of the judgment of the trial court, and if there is a *res* in controversy which has been brought within the jurisdiction of the court when the appeal was perfected, the supersedeas bond does not deprive the appellate court of its power and jurisdiction over the *res* and to finally dispose of the same, and to protect it by the exercise of its jurisdictional authority during the time the controversy is pending; (p. 840)

(10) An appellate court is vested with complete jurisdiction over the person and subject matter in litigation, upon the perfection of an appeal from a final judgment and the adjournment for the term of the trial court, and from this period the appellate court has full control of the cause and may make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates, which jurisdiction continues until the case as made by the appeal or writ of error is fully determined by the appellate court, and its judgment is completely executed by the court below, this jurisdiction being unaffected by a supersedeas

bond which merely suspends the enforcement or execution of the judgment below; (p. 842½, 843)

(11) The doctrine that a second receivership is permissible under certain circumstances has no application where the appointment of a second receiver is as broad as the first one and is not a mere temporary expedient looking to the preservation and protection of property during the pendency of an appeal under the first *receivership;* (p. 843) and

(12) Where there is a clash of jurisdiction between a state and a Federal court, the proper course is for the injured party to appear before the court wrongfully exercising jurisdiction and there, by suit, pleas, or application, urge and insist upon his rights and ask for such orders, decrees, and judgments as may be necessary. (p. 844)

NOTE.

Only two of the three justices constituting the court of civil appeals of Texas participated in the foregoing decision, the third justice being absent on account of sickness. The two justices who heard the petition or application disagreed as to a portion of the relief to be granted.

Fisher, the Chief Justice, held: (a) that it was not clear from sections 1, 2 and 3, Act of April 11, 1907, that the court of civil appeals had original jurisdiction to appoint a receiver; and (b) that courts of co-ordinate jurisdiction cannot interfere in the administration of justice by each other, although the jurisdiction of one of such courts first attaches and is exclusive, and that therefore a state court has no power to restrain either the process or proceeding of the national courts; and, (c) that the possession of property by a receiver is the possession of the court which appoints him, the receiver being merely an arm and agent of the court and the property being in the actual possession and control of the court merely through the medium of the receiver. (p. 844½)

Key, Justice, held that the Act of April 11, 1907, expressly conferred original jurisdiction to appoint a receiver upon any court in which a proceeding of a certain character was pending, whether the trial court or the court of civil appeals, and that such court also had the power to require a Federal

receiver to surrender possession of property to the state receiver; because, while one court cannot issue and enforce its process against another court of co-ordinate jurisdiction, a court has such power whenever another court goes beyond the limits of its jurisdiction and undertakes to do that which it has no power to do, such action being null and void; and that under the circumstances of the particular case before the court of civil appeals, the Federal receiver was not acting as such under proper authority, but as an individual without authority. (p. 846½)

On appeal from the order appointing a receiver, it was held that:

(a) Upon revocation of a permit to a foreign corporation to do business within the state, a receiver may be appointed for the corporation's property within the state, under the Act of April 11, 1907, or subdivision 3, article 1465, Sayles' Civil Statute 1897, which in effect provides that a receiver may be appointed where a corporation is dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; (105 S. W. 852)

(b) In appointing a receiver under Act of April 11, 1907, or subdivision 3, article 1465, Sayles' Civil Statute, 1897, a court may take judicial notice of the facts exhibited in the main case upon which the receivership is predicated, and of the judgment or decree rendered in that case, without again rehearing or reviewing the facts that were established in the original case upon which the receivership depends; (p. 852½)

(c) Upon a forfeiture of the franchise of a domestic corporation or the permit to do business of a foreign corporation, no formal petition or bill for the appointment of a receiver is necessary in Texas, as the court may, independently of the request of anyone, exercise his judicial discretion as to whether he will or will not appoint a receiver; (p. 853) and

(d) In the absence of proof in the record showing that facts did not exist or that they were insufficient to justify the particular action of the court, the presumption will be indulged in favor of the action of the trial court, and that the facts were sufficient to sustain the judgment. (p. 852½)

WATERS-PIERCE OIL CO. v. STATE.

(— Tex. —, 106 S. W. 326, 1907.)

Appeal and Error; Receivership; Courts.

In an action by the state against the Waters-Pierce Oil Company, a foreign corporation, a receiver was appointed after said company was fined $1,623,000, and its permit to do business in the state was forfeited. An appeal was thereupon prosecuted from the original or main case, a bond was given according to statute, and a record was filed in the court of civil appeals, embracing all of the proceedings, including the application for the appointment of a receiver. From the order appointing the receiver, a separate appeal was perfected, a bond was given in an amount prescribed by the court, and a record was filed embracing only the receivership proceedings. On the affirmance by the court of civil appeals of the order appointing the receiver and overruling a motion for a rehearing, that court ordered the receiver to proceed with the discharge of his duties and issued a mandate to the trial court. The receiver was never in possession of the company's property. The oil company having made proper application to the supreme court for a writ of error, and having moved for a recall of said mandate, the supreme court ordered the mandate's recall; whereupon the state applied to the supreme court for the appointment of another receiver, stating among other things that upon an application to a federal circuit court by one of the Oil Company's stockholders a receiver was appointed for said company who took possession of its property in the state; that upon appeal to the circuit court of appeals of the United States, that court held that the federal circuit court had no jurisdiction over the matter and ordered the discharge of said

receiver; that the state of Texas had a lien upon the Oil Company's property in the state; and that if the federal receiver should return the property to the Oil Company, there was no one to receive and take control of it in the state. In overruling this motion, it was held that:

(1) Where a reviewing court has jurisdiction only of final judgments, orders, or decrees, an order appointing or refusing the appointment of a receiver is such final order as is appealable; (106 S. W. 329, 329½)

(2) When orders are made at different times which finally dispose of the subject-matter of the particular order, such an order is appealable, although this would result in more than one appeal in the same case; (p. 328)

(3) When two appealable orders are entered in the same case at the same term of court, by prosecuting separate appeals and presenting separate records, the appellant is entitled to a review of each order, although both orders may have been reviewed in the appeal of the principal case; (pp. 328½, 329)

(4) Under article 1383, Revised Statute 1895, permitting the prosecution of an appeal or writ of error, and which fails to provide for the taking of a bond, the court granting the appeal may fix the amount of the bond adequate for the protection of the rights of the parties; (pp. 329½, 330)

(5) An objection that an appeal bond is for less than double the amount of the judgment, order, or decree, comes too late if made for the first time in the supreme court; (p. 330)

(6) Upon compliance by appellant or plaintiff in error with article 1404, Revised Statute 1895, the judgment, order, or decree cannot be enforced during the pendency of the appeal or writ of error; (p. 330)

(7) Pending an appeal or writ of error, the operation of the order appointing a receiver is suspended under article 1404, Revised Statute 1895; (pp. 330, 330½)

(8) The court of civil appeals has no authority to issue a mandate upon its judgment until the expiration of the time

allowed by law for the filing of an application for a writ of error; (p. 329½)

(9) Appellate jurisdiction is the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts; (p. 331)

(10) The supreme court has power to appoint a receiver whenever it is made to appear that a receiver in the active discharge of his duties is necessary to enable said court to exercise its authority over the case and to revise the action and ruling of the inferior courts; (p. 331½)

(11) The supreme court has power to maintain the possession of a receiver during the pendency of an appeal, but cannot appoint a receiver who has never had possession; (p. 332)

(12) Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction and to prevent any abuse of its process; (p. 331) and

(13) A motion for the appointment of a receiver by the supreme court is insufficient when it is based upon the ground that the defendant, if permitted to use his property, would violate the laws of the state, and the further ground that a receiver is necessary as security for the collection of a judgment. (p. 331½)

NOTE.

This case is distinguishable from *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 8 Am. St. Rep. 192, because the receiver in that case had possession before an appeal was taken.

WATERS-PIERCE OIL CO. v. STATE.

(— Tex. Civ. App. —, 106 S. W. 918, 1907-1908.)

Statutes, Texas; Agency; Class Legislation; Construction; Actions, Limitations; Proof.

May 31, 1900, the state of Texas licensed the Waters-Pierce Oil Company, a Missouri corporation, to do business in the state. In September, 1906, the state of Texas brought an action against said company for the cancellation of its permit and the recovery of certain penalties for violations of Texas anti-trust laws. By original and amended petitions it was in substance alleged that on or about January, 1870, certain named individuals conceived the scheme of monopolizing and controlling the business of refining and selling petroleum throughout the United States, including the state of Texas; that thereupon said persons entered into a conspiracy among themselves and with other individuals and corporations, including the defendant corporation, which conspiracy continued until the commencement of said proceedings; that in pursuance of said conspiracy the defendant performed various acts and entered into various agreements constituting violations of the anti-trust laws of Texas; that the defendant's predecessor entered into a contract with the Eagle Refining Company and certain named individuals, by the terms of which the defendant acquired the property of the last mentioned company, situated in the city of Dallas, Texas; that the defendant subsequently operated said Eagle Refining Company and maintained its plant in Texas as an apparently competing concern; and that afterwards, the defendant's predecessor bought out the business of the Texas Oil & Gasoline Company and a certain named individual, who were at the time doing business in the city of San An-

tonio, Texas, and elsewhere, and entered into contracts and agreements with them whereby the Gasoline Company was thereafter operated under its name by the defendant as an apparently competing concern. After denying generally the allegations made in said petitions, the defendant pleaded specially in effect that if it had entered into any of the alleged agreements or committed any of the alleged acts, none of them constituted violations of the anti-trust laws of Texas, and claimed that the agreements, if made, and the acts, if done, related solely to subjects of interstate commerce. The defendant also raised various special exceptions, such as the statute of limitations, etc. Upon a trial by jury the defendant was found guilty and judgment was entered upon the verdict. In affirming this judgment it was held that:

(1) Performance within the state of Texas of an agreement or understanding prohibited by its anti-trust laws renders the person or corporation performing amenable to such laws, although the agreement or understanding is entered into in another state; (106 S. W. 930)

(2) A foreign corporation is liable for the acts of its agents performed in a state in which it is doing business, when the acts are done in the scope of the agent's employment and agency, when such acts are authorized by the corporation, or when unauthorized acts of agents have been knowingly acquiesced in or ratified by the governing body of the corporation; (pp. 920, 930)

(3) Texas anti-trust act of May 25, 1899, is not too indefinite and uncertain, and is constitutional; (pp. 925, 925½)

(4) Texas anti-trust law of 1899, by fixing a fine at not less than $200 nor more than $5,000 for its violation, is not indefinite; (p. 928)

(5) Texas anti-trust law of 1899 authorizes valid fines and forfeitures; (p. 930)

(6) Act of May 27, 1899 (Laws 1899, p. 262, c. 153), pro-

viding for the protection of workingmen in their right of organization, by reserving from its operation existing laws on the subject of conspiracies against trade, pools, and monopolies, does not render the anti-trust act of 1899 unconstitutional, although said Act and the laws against trade, etc., were passed at the same session of the legislature; (p. 929)

(7) Texas anti-trust act of March 31, 1903, is not too indefinite and uncertain, and is constitutional; (pp. 925, 925½)

(8) The word "guilty" is frequently used in a civil sense, as "guilty of fraud," "guilty of negligence;" (p. 927)

(9) The word "offense" used in Texas anti-trust laws of 1899 and 1903 has reference to violations of their provisions, and is not equivalent to the word "felony" or "misdemeanor;" (p. 927)

(10) The use of the words "guilty," "offense" and "convicted" in a statute does not in itself render the statute criminal; (p. 927)

(11) An offense punishable by penitentiary imprisonment, absolutely or in the alternative, does not always constitute a felony; (p. 929)

(12) In construing statutes, courts are not bound by rules of grammar, and may disregard them in order to give effect to the manifest legislative intention; (p. 930)

(13) Whatever rights a state had under Texas anti-trust law of 1899, including the right to enforce the penalties prescribed by that Act, are preserved by a special provision of the anti-trust law of 1903; (p. 929½)

(14) Texas anti-trust laws of 1899 and 1903 authorize the bringing of civil proceedings for the recovery of pecuniary penalties; (pp. 926, 927, 928)

(15) Where a statute provides for the recovery of pecuniary penalties in case of its violation, but does not expressly require its enforcement by criminal proceedings, the state may proceed in a civil action for the recovery of such penalties; (p. 927)

(16) In Texas, the proper remedy for the recovery of a statutory penalty is an action of debt; (p. 927)

(17) An action of debt will lie for the recovery of statutory penalties; (p. 927)

(18) An action of debt for the recovery of a statutory penalty, in Texas, must be commenced within two years, the same as any other indebtedness which is not evidenced by a written contract; (p. 927)

(19) Article 219 Code Criminal Procedure 1895, providing two years' limitation for all misdemeanors in which an indictment or information may be presented, is inapplicable to proceedings brought under Texas anti-trust laws of 1899 and 1903; (pp. 925, 926)

(20) Article 218 Code Criminal Procedure 1895, limiting the time in which to institute certain criminal actions, is inapplicable to a civil suit brought for the recovery of penalties under Texas anti-trust law of 1903; (p. 929)

(21) Neither the two nor the four years' limitation of civil cases embodied in the Revised Statute of Texas is applicable to a civil action brought under 1899 and 1903 Texas anti-trust laws; (p. 929)

(22) Unless precisely provided, the statute of limitations does not run against the state; (pp. 929, 929½) and

(23) In a civil proceeding the state is not bound to prove its case beyond a reasonable doubt. (p. 929)

NOTE.

Key, J., who wrote the opinion, held that the Texas anti-trust law of 1903, prohibiting the acquisition of capital stock or other property of another corporation for certain purposes, is applicable to corporations purchasing capital stock, and not to corporations whose capital stock is being purchased, unless the selling corporation is in some manner responsible for the unlawful acts of the acquiring corporation. As the case turned on other issues, this holding is not authoritative.

WATERS-PIERCE OIL CO. v. TEXAS et al.

(177 U. S. 28, 44 L. ed. 657, Tex. 1900.)

Statutes; Constitutional Law; Foreign Corporations, Contracts; Interstate Commerce.

In January, 1882, a great many individuals, firms and corporations, owning and controlling a large amount of capital invested in the production and sale of petroleum and its products, entered into a trust agreement. The parties to this agreement consisted of 11 partnerships and corporations; 44 individuals; 25 stockholders; and members of corporations and limited partnerships, who did not constitute all of the stockholders and members of the respective corporations and partnerships; and of such other individuals, partnerships and corporations as should afterwards join in a designated manner. The Waters-Pierce Oil Co., a Missouri corporation, was one of the enumerated parties. Under this agreement a corporation was to be formed in Ohio, New York, Pennsylvania and New Jersey, or any existing corporation could be used, to mine, manufacture, refine and deal in petroleum and all its by-products. To corporations thus organized all the business, rights and stock of the parties to the agreement were to be transferred, and trust certificates issued in consideration thereof. Certain trustees were appointed to carry out the objects of the agreement. In July, 1889, the Waters-Pierce Oil Co. was admitted to do business in Texas for ten years by complying with its foreign corporation laws. By section 4 of the 1889 Texas anti-trust act it is, in substance, provided that every foreign corporation violating any of the provisions of said Act is thereby denied the right to do any business within the state. In a proceeding by the state to forfeit the right of the Waters-Pierce Oil Co. to do business in

Texas it was charged that said corporation violated said Act by becoming a party to the foregoing agreement, which, it was alleged, was entered into for the purpose of controlling and monopolizing the petroleum industry in the United States, as well as the business of manufacturing, refining, selling and transporting petroleum and its products, etc.; that the trustees provided for in said agreement proceeded to execute and were executing it by dividing the markets of the United States and reducing prices in order to destroy competition, and when this end was accomplished, by raising prices above the market price; that a member of said trust was indemnified against loss by the combined power and wealth of all its parties; that the Waters-Pierce Oil Co. transferred its stock to said trustees, and that it had taken no corporate action against the transfer, but acquiesced in the same; that in pursuance of said policy the Waters-Pierce Oil Co. confined its business in a certain subdivision; that no other party to the agreement transacted business in the territory allotted to said company; that the said company pursued the method of driving out and overcoming competition in the sale of oils that was pursued by the other members to said agreement; that in the Texas market there was no competition between the Waters-Pierce Oil Co. and such other parties; that since a certain date said company made contracts with merchants and others in consideration of a small rebate on the purchase whereby such merchants contracted not to buy oil from any other person or corporation, and to sell oils bought from said company exclusively; that in some instances merchants agreed not to sell the oils so bought to any one buying from any person or corporation dealing in oils in competition with the Waters-Pierce Oil Co.; that a certain Ohio corporation, which was at one time competing with the Waters-Pierce Oil Co. in Texas, entered into a certain combination and trust with the Waters-Pierce Oil Co. whereby the Waters-Pierce Oil Co. secured the control of all the property, business and franchises of the Ohio com-

pany, causing it to withdraw from doing business within the state; that since a certain date the Ohio company was carrying on a sham competition with said Waters-Pierce Oil Co.; that on a certain other date a certain other competitor, an individual, entered into an arrangement with the Waters-Pierce Oil Co., by the terms of which the Waters-Pierce Oil Co. also secured the control and management of his business, and thereafter conducted the same in his name, but for its benefit; and that the Waters-Pierce Oil Co., since it obtained said permit, had abused its franchises and privileges, had monopolized the oil trade in the state, had unlawfully entered into the contracts mentioned, and was engaged in making similar ones, had lowered the price of its oils against competing oils below a reasonable and fair market value, had refused to sell, except at exorbitant prices, to those dealing in competing oils, had pursued and carried out a system of threats and intimidations and bribery to prevent parties from buying or selling competing oils, had given rebates to buyers from it as an inducement not to patronize a competitor, had offered money, or the payment of expenses incident thereto, to induce parties ordering competing oils to countermand the orders and refuse to take the same under contracts, and that such a course of dealing had resulted in the complete monopolization by the oil company of the oil trade of the state. By demurrer to this petition it was urged that the anti-trust acts of 1889 and 1895 were repugnant to the 14th amendment of the Constitution of the United States, and that the petition was insufficient of allegations as a ground of forfeiture of the oil company's permit to do business in the state. Upon overruling the demurrer the oil company answered denying generally and specifically the allegations in the petition, and claiming the permit to do business in the state as a contract which was protected by the Constitution of the United States against impairment by subsequent legislation and which permitted the oil company to engage in interstate commerce, denying the jurisdiction of the

state to regulate it. The single issue submitted to the jury was the Waters-Pierce Oil Co.'s method of dealing in the state with reference to local business. The question whether the oil company was or was not a member of the Standard Oil Trust was excluded because of insufficiency of evidence. The alleged contracts of the oil company with the Ohio company and the individual referred to were also excluded as not being in violation of state laws. The trial resulted in a verdict against the oil company, upon which judgment of ouster was given. On appeal to the court of civil appeals the judgment was affirmed. In further affirmance of this judgment it was held that:

(1) Texas anti-trust act of 1889, in so far as it provides for forfeiture of the permit of a foreign corporation which violates any of its provisions, is constitutional; (177 U. S. 47)

(2) Upon acceptance by a foreign corporation of a permit to do business in a state having a statute providing for forfeiture of the permit when such corporation violates any of its provisions, the statute becomes a part of the permit; (p. 47)

(3) The right of a foreign corporation to contract is not the same as that of a natural person, and is not protected by section 1 of the 14th amendment to the Federal constitution; (p. 43, *et seq.*)

(4) The right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, except when the business is of an interstate commerce character; (p. 46)

(5) Texas 1895 anti-trust act did not repeal the Texas 1889 anti-trust act; (p. 47)

(6) The meaning given by state courts to their statutes is binding upon Federal courts; (p. 43) and

(7) In order that an objection to the constitutionality of a statute may be considered, it must come from one whose rights are affected thereby. (p. 43)

WEBB PRESS CO. v. BIERCE et al.

(41 So. 203, La. 1906.)

Contracts; Threatened Competition.

The Oklahoma Cotton Compress Company was organized by the Bierces to erect and operate in Oklahoma City a Bierce Hydraulic Press. Before actual establishment of said press the Webb Company, competitors of the Bierces, became active in an attempt to place one of its presses in said city. It was apparent to both of these competitors that only one press could be operated at a profit. After some negotiation between these competitors an agreement was entered into whereby, in consideration of the payment by the Bierces to Webb Company of $5,000, half of which was to be paid in cash and the remainder to be evidenced by note, Webb Company agreed to withdraw said threatened competition for a period of two years. Afterward, the cash consideration was paid, a note given, and Webb Company withdrew from said field. In a suit by Webb Company against the Bierces on said note, the action was defended on the ground that the agreement and note were in restraint of trade. The trial court sustained this defense. In affirming this judgment, it was held that:

(1) "A contract whereby a party, who contemplates engaging in a lawful business in a particular place, for a pecuniary consideration paid and promised, binds himself not to do so, in favor of another, with whom he had no previous business relations and who is about engaging in the same business at the same place, is void, under the general commercial law, as in unreasonable restraint of trade, and a fortiori is unenforcible when in contravention of an express prohibition of the law in the place where it was made and is to be executed;"

(2) A note is void when the consideration is that the payee shall abandon threatened competition; and

(3) The validity of a contract is determined by the law of the place where the contract is made and is to be performed.

WESTERN WOODEN-WARE ASSOCIATION v. STARKEY et al.

(84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686, 1890.)

Sales, Foreign Corporations, Public Policy.

In 1888 three individuals, as partners, engaged in the manufacture and sale of wooden-ware at St. Louis, Michigan, occupying certain premises with a manufacturing plant and owning a large quantity of manufactured articles, materials, tools, etc., entered into an agreement with an Illinois corporation, engaged in a similar business, by virtue of which, for a consideration of $6,000, they sold to said corporation all of their stock on hand, materials, etc., and agreed not to engage in the manufacture of tubs, etc., for five years in eight states, nor to sell their real estate to be used for that purpose to any one without said corporation's consent. The agreement contained a stipulated penalty as liquidated damages in case of its violation. After making said contract and receiving the consideration therefor the covenantors breached the same. To a bill for an injunction and an accounting against said parties a general demurrer was sustained. In affirming this judgment it was held that:

(1) A contract by which a foreign corporation purchases a domestic manufacturing business for the purpose of closing its doors for the period of five years, and which provides that during that period the plant shall not be used by any one for carrying on such business and the proprietors shall not engage in the same business in certain named states is against public policy and void; and

(2) When contracts are prejudicial to the public interests, they are void as against public policy.

NOTE.

The principles and reasons underlying this case are very clearly and ably discussed in Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 1899.

WEST VIRGINIA TRANSPORTATION CO. v. OHIO RIVER PIPE LINE CO.

(7 Watts [22 W. Va.] 600, 46 Am. Rep. 527, 1883.)

Real Property, Conveyances, Exclusive Contracts; Quasi Public Corporations; Pleading.

The owners of a large tract of oil-producing land being unable to fully develop it, deeded the exclusive right of way and privilege to maintain lines of tubing, etc., for the transportation of oil over said land to a transportation company, the grantee reserving the privilege of removing such tubing at its pleasure. In pursuance of this grant, the transportation company entered upon the land and constructed various pipe lines for the transportation of oil. Subsequently, the same owners conveyed to other parties the fee to a portion of said land. Believing the transportation company's charges exorbitant, said grantees concluded to lay pipes to various oil wells on their part of said land, and connect them with the pipes of another transportation company. Thereupon, the first transportation company brought injunction proceedings and obtained a temporary injunction. Upon a hearing, however, this injunction was dissolved and the petition was dismissed. In affirming this decree, it was held that:

(1) Any private deed or contract granting to a *quasi* public corporation the exclusive privilege or right of way over certain land, while binding upon the parties to the instrument and their assigns, is void as against the public and corporations entitled to take such land for public use, on the ground of public policy; (22 W. Va. 626)

(2) No one can give to a railroad or telegraph company the exclusive right of way for a railroad or telegraph line through his land however small a parcel it may be, all contracts granting such a right being contrary to public policy; (p. 627)

(3) Some businesses, from their peculiar character, cannot be restrained to any extent without prejudice to the public interests, and courts are compelled to hold void any contract imposing any restraint, however partial, on such peculiar business; (p. 625)

(4) When a corporation is given the right of eminent domain, although the corporation is created by special enactment, the right thus conferred upon the corporation makes it *quasi* public and impresses its business with a public interest or use; (p. 625)

(5) At common law all contracts in restraint of trade in any degree clearly injurious to the public are invalid; (p. 617)

(6) Contracts in apparent partial restraint of trade when neither injurious to the public at large nor even to the obligors, and when this is made to appear affirmatively, are valid; (p. 617)

(7) "Contracts in restraint of trade are in themselves, if nothing shows them to be *reasonable,* bad in the eye of the law; and though such contract be for a pecuniary consideration, or, what is the same thing, though it be under seal and stipulate only that a certain trade or profession shall not be carried on in a particular place, if there be no recitals in the deed or contract or no averments and proof showing circumstances which render such contract *reasonable,* the contract or instrument is void, though it be but in partial restraint of trade;" (p. 617)

(8) Contracts in restraint of trade are valid whenever the restriction of the particular trade or business is partial and reasonable under all the circumstances relating to the restriction, the object of the parties, the nature of the business, and, extent of the restriction in reference to time and space regardless of the adequacy or inadequacy of the consideration; (p. 621)

(9) "A landlord may by contract under seal impose on the lands, which he leases, burdens, which will not only be binding on the tenant but also on sub-tenants, they being covenants real running with the land. But except between land-

lord and tenant no burdens can be imposed on lands by any covenant of the owner, which will run with the land and bind any grantee of the land; for such covenants are personal and are not covenants real running with the land;" (syl. 6)

(10) "An agreement by a land-owner, that the products of his land shall be transported to market by a certain common carrier. is not a covenant real and does not run with the land or bind any subsequent purchaser of the land;" (syl. 7)

(11) "A court of equity would not enforce the performance of such covenants by a subsequent purchaser of the land, though he bought the land with full notice of the existence of such covenant;" (syl. 8) and

(12) The reasonableness of a contract in restraint of trade when not shown upon its face, may be averred in the pleadings and proven. (p. 618)

WEST VIRGINIA TRANSPORTATION CO. v. STANDARD OIL CO.

(50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 1902.)

Competition, Scope; Torts, Corporations; Pleading.

This was an action of tort by the West Virginia Transportation Company against the Standard Oil Company and the Eureka Pipe Line Company, the plaintiff and defendants being corporations. The declaration consisted of two counts. The first count substantially charged that the Standard Oil Company, of New Jersey, was organized in 1891 as the successor to firms and corporations existing prior to that date, associated together under a contract known as the Standard Oil Trust; that the Camden Consolidated Oil Company was a member of said trust; that in 1892 the business and property of said trust were reorganized under, and were then controlled by, the Standard Oil Company, by the same men who formerly owned and controlled said Standard Oil Trust; that the Eureka Pipe Line Company was owned and operated by the same men and was doing business in the interest of the Standard Oil Company and was a transportation branch of that Company; that the West Virginia Oil Company was organized about 1885, to purchase and operate the property of the West Virginia Oil and Land Company, a territory on which the plaintiff had laid pipe lines, and from which it had for several years transported oil; that the Standard Oil Trust, through individuals interested in it, had become a large stockholder in the West Virginia Oil Company, dictating its management, and by means thereof, and of its monopoly of the production, refining and transportation of oil throughout the world, practically controlled the business of said West Virginia Oil Company, and since the reorganization of the Standard Oil Trust by the organization of the Standard Oil

Company continued to do so and induced the construction of the Eureka Pipe Line; that the plaintiff was engaged in the business of transporting petroleum oils by means of pipe lines, etc., through a designated territory, had expended a large sum of money in acquiring land, etc., and built up a large and lucrative business; that the defendant, maliciously and wickedly contriving and intending to injure the plaintiff and ruin its business, render its plant and property worthless, and deprive it of all its business, did confederate and conspire with the West Virginia Oil Company, with a certain named individual, and with other persons unknown to the plaintiff, to prevent all persons from producing, refining, selling, or transporting oils, and particularly to prevent the plaintiff from transporting oils through its pipe lines and by means of its tank cars, and from storing oil in its storage tanks, and from conducting any lawful trade in connection therewith. The second count was in substance that the defendants and a certain named individual conspired to destroy the plant and business of the plaintiff, and did, by threats and unfair means, oblige persons owning and producing oil to ship it by other means of transportation than the plaintiff's, which persons had before been the customers of the plaintiff, and that the West Virginia Oil Company and said individual notified such customers not to ship any oil over the plaintiff's line. Upon demurrer, judgment was rendered in defendants' favor. In reversing this judgment, and adjudging the first count good and the second count bad, it was held that:

(1) While in the race of competition, and in the absence of a contract to the contrary, one may without liability induce another's customers to withdraw their custom in his favor, regardless of good or bad motive, where such an act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another, it is actionable, if loss ensue; (50 W. Va. 624, 625)

(2) The malicious causing of injury to another without justifiable cause is an actionable wrong; (p. 624)

(3) Malice or bad motive in doing an otherwise lawful act does not change the character of such an act; (p. 617)

(4) There is no actionable tort, unless there is a duty from one to another and that duty is disregarded; (p. 615)

(5) *Damnum* means only harm, hurt, loss, damage; while *injuria* means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage; (p. 615)

(6) A corporation, through its officers and agents, may be guilty of a combination or conspiracy to do an unlawful act; (p. 614)

(7) Corporations having the same interests, like individuals, have a constitutional right to combine for purposes of competition; (p. 616) and

(8) When a declaration is indefinite in some important respect, but the indefiniteness can be remedied by a bill of particulars, the declaration will not be considered too general. (p. 622)

WHEELER-STENZEL CO. v. NATIONAL WINDOW GLASS JOBBERS' ASS'N.

(152 Fed. 864, 10 L. R. A. (N. S.) 972, C. C. A., N. J. 1907.)

Actions, Sherman Act, Legal Injury; Damnum Absque Injuria; Restraint of Trade, Interstate Commerce; Pleading.

The substantial portion of the declaration in the foregoing case was that before and up to the combination complained of, the American Window Glass Company owned and operated factories in certain specified states, selling and delivering its product to wholesalers in each of the states named; that these wholesalers constituted more than seventy-five per cent of the jobbers and wholesalers in window glass, doing more than seventy-five per cent of the business in the United States; that on a given date these wholesalers and the American Window Glass Company combined and conspired to restrain and monopolize interstate commerce, and continued to do so, by arbitrarily fixing and charging unreasonable and excessive prices to retailers of window glass throughout the United States, by restricting and limiting the quantity of window glass to be purchased by each of these wholesalers, by refusing to purchase window glass from any other manufacturer than the American Window Glass Company, except at certain unreasonable prices, by establishing rules and regulations forbidding, under pecuniary penalties, said wholesalers from selling window glass to other wholesalers outside of the combination, and by restricting the territory wherein each of these wholesalers should sell his or its products; that said wholesalers owned a large majority of the stock in, and controlled the American Window Glass Company; that the plaintiff was a wholesaler and jobber in window glass, doing business at Boston; that prior to the combination, it had extensive dealings with the American Window Glass Company, importing its products into Massachusetts and selling it in the New

England States; and that by reason of said combination the plaintiff was injured in its said business. The declaration consisted of two counts, which were similar except that one was based upon an alleged combination and conspiracy in restraint of trade, contrary to provisions of the anti-trust act, the other upon an alleged contract or agreement in restraint of trade, likewise contrary to the provisions of said act. The defendant interposed a special demurrer to each of these counts. The lower court sustained the demurrer on the ground that the plaintiff failed to show injury or damage. In reversing this judgment it was held that:

(1) Where one is harmed in his business or property by a violation of the Sherman Act, he has suffered a legal injury and is entitled to his action therefor; (152 Fed. 874)

(2) Under section 7, Sherman Act, an action for damages will lie although such damage or loss would not have been actionable at common law; (p. 873)

(3) *Damnum absque injuria* is inapplicable to actions brought under section 7 of the Sherman Act; (p. 871, *et seq.*)

(4) Every contract or combination, whether reasonable or unreasonable, directly restraining, or necessarily operating in restraint of trade or commerce among the states is unlawful under the Sherman Act; (p. 868)

(5) A contract or combination necessarily resulting in the destruction of competition, in whole or in part, in trade or commerce among the states is in restraint thereof and within the inhibition of the Sherman Act; (p. 868)

(6) Where the contract or combination involves the purchase and sale of articles between manufacturers and dealers of different states, interstate commerce is thereby affected; (p. 867) and

(7) When a particular illegal contract or combination has been alleged with requisite clearness, a general allegation or statement of damage to the effect that the result of such contract or combination is to deprive the plaintiff of his customers and prevent the making of a profit upon his legitimate business as it theretofore existed, is all that is necessary to lay ground for evidence under section 7, Sherman Act. (p. 874)

WHITWELL v. CONTINENTAL TOBACCO CO. et al.

(125 Fed. 454, 64 L. R. A. 689, U. S. C. C. A., Minn. 1903.)

Statutes; Contracts, Restraint of Trade; Damages; Pleading.

The Continental Tobacco Company, as owner and controller of most of the valuable and leading brands of plug and chewing tobacco in the United States, made it a practice to make quarterly allotments of its goods to intending purchasers considerably in excess of their actual needs and fixing the price so high that it would be unprofitable for them to handle, unless such intending purchasers would agree not to deal in the same class of goods manufactured by independent and competing manufacturers; in which case, the allotment was made suitable to the purchasers' requirements and a rebate given making it profitable for them to handle said goods. After participating in this method of dealing with the Continental Tobacco Company for some time W refused to refrain from handling the goods of independent tobacco manufacturers. Whereupon, the Tobacco Company refused to make allotments to W, except in the prohibitive form. W brought an action against the Tobacco Company under the Federal anti-trust law for treble damages, charging them with combining and conspiring to regulate the prices of their goods, with controlling the output thereof with the intent to monopolize trade and commerce, with combining to arbitrarily fix the prices of their goods independently of the natural market value, and with refusing to sell them on equal terms to all intending purchasers, and alleging that all these acts were done in restraint of trade and commerce among the states. A general demurrer to the petition was sustained and the petition was dismissed. In affirming this judgment it was held that:

(1) There is no direct restraint of trade or commerce where a manufacturer or merchant, engaged in commerce among the states, sells only to those who do not buy or sell the wares of his competitors; (125 Fed. 456)

(2) Where the main purpose and chief effect of a contract are to foster the trade, and the contract promotes, or only incidentally or indirectly restricts, competition, such a contract is not within the prohibition of section 1 of the Federal anti-trust law; (p. 458)

(3) Whether or not a contract, combination or conspiracy is in restraint of trade must be determined by the necessary and direct effect it has upon competition in commerce among the states; (p. 457)

(4) An attempt to monopolize a part of interstate commerce which promotes, or only incidentally or indirectly restricts, competition therein, while its main purposes and chief effects are to increase the trade and foster the business of those who make it, is not illegal under section 2 of the Federal anti-trust law; (p. 463)

(5) "No act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him;" (p. 463) and

(6) In determining whether or not certain facts constitute a good cause of action, mere general allegations of intent, purpose and effect of such facts should be disregarded. (p. 457)

WILLIS v. MUSCOGEE MFG. CO.

(120 Ga. 597, 48 S. E. 177, 1904.)

Conspiracy; Employee's Wrongful Discharge; Damages.

Within a particular locality a number of manufacturers adopted a rule that employees must give a six-days' notice when leaving employment. Willis, having been employed by one of these manufacturers to do a certain class of work, was requested to perform another and more difficult kind of work. On demanding more pay he was discharged. The other manufacturers were thereupon notified that Willis left without giving the required notice. Unable to procure employment on account of this, Willis removed to another town. He then brought suit to recover damages for wrongful discharge. There was considerable conflict in the claims of the parties as to the actual contract made regarding the class of work to be performed by Willis and with reference to its termination. The trial court nonsuited the plaintiff. In reversing the judgment it was held that:

(1) A number of independent employers may agree among themselves upon a reasonable rule of employment and to report to one another an employee's violation of such rule in order to prevent such employee from securing re-employment;

(2) An employer may make reasonable rules for his employees;

(3) Where an independent employer wrongfully reports to other independent employers an employee's violation of a mutual rule of employment, causing him loss, the employer is liable for damages as for a tort; and

(4) Under the facts, the case was erroneously taken from the jury.

WILLSON et al. v. MORSE et al.

(117 Ia. 581, 91 N. W. 823, 1902.)

Statutes; Partnership; Contracts; Evidence.

Two firms entered into a new partnership for the purchase and sale of all grain and oats in a certain locality and to share alike in losses and gains. In an action in equity on this contract for a share of the profits it was contended that the contract was in contravention of section 5060 of the Code, and that the contract was abandoned. The trial court gave judgment for the plaintiff. In affirming this judgment it was held that:

(1) Section 5060 of the Code does not prohibit a consolidation of two partnerships, when not done for the purpose of stifling competition; (117 Ia. 585)

(2) Two partnerships may form a new copartnership; (p. 584)

(3) Where a contract is legal upon its face, it will not be declared illegal because one of its parties, at the time of making it, had in mind an illegal purpose, not known by or communicated to the other party, and when such purpose was not carried out; (p. 584)

(4) In the construction of contracts between relatives, their relationship is an important fact to be considered when viewing conduct which, under other circumstances, might be treated as controlling; (p. 585)

(5) Whether or not a contract has been revoked or annulled is a question of fact; (p. 585)

(6) Whether or not a contract legal upon its face was entered into for the purpose of preventing competition or fixing and regulating the price of articles of merchandise or commodity is a question of fact to be determined from the evidence; (p. 584)

(7) When a contract is legal on its face but is attacked for illegality on the ground that it had been entered into for the purpose of stifling competition and fixing and controlling prices of a certain commodity, the burden of proof is on the attacking parties to show the illegality by satisfactory and convincing evidence; (p. 584) and

(8) Before a book containing entries of account between parties is admissible, it is necessary to prove its identity and genuineness. (p. 586)

WILEY v. NATIONAL WALL PAPER CO.

(70 Ill. App. 543, 1897.)

Pleading; Confession and Avoidance; Trust Defense; Appeal and Error.

N sued W for the purchase price of wall-paper. W pleaded anti-trust Act of June 20, 1893, in defense. The report of this case does not disclose the particular facts pleaded. Demurrers to these pleas were sustained. Abiding by these pleas, the defendant permitted judgment to go against him. On appeal the judgment of the trial court was affirmed, the appellate court holding that:

(1) A plea by way of confession and avoidance is demurrable unless it gives color—an apparent or *prima facie* right of action, independently of the matter disclosed in the plea to destroy it;

(2) Where an action upon an apparently valid contract is resisted on the ground that the plaintiff constitutes, or is a member of, an unlawful trust or combination, when such defense is by statute authorized, a plea setting up this defense must allege: (a) enough facts, if proved, from which a court might determine that an unlawful trust or combination exists; (b) that the contract or sale relied upon by the plaintiff was made in furtherance of, or is connected with, such illegal combination; and (c) that the consideration for the contract or sale is unreasonable and was induced by such unlawful combination; and

(3) On appeal the presumption is indulged that no error has been committed, unless there is an exception to the ruling complained of, and the exception is properly preserved in the record.

WITTENBERG et al. v. MOLLYNEAUX.

(60 Neb. 583, 83 N. W. 842, 1900.)

Contracts; Trade Restraint; Vendor's Covenant; Practice.

When this case was before the supreme court the first time (58 N. W. 205) it was heard on the pleadings, and judgment was reversed and the case was remanded. As to the merits, the main facts were these: M & W were independent hotel owners in a certain city and agreed to and did exchange their properties. In M's conveyance to W and others it was stipulated that grantees shall not use the property therein conveyed for hotel purposes for a period of two years. On breach of this covenant, W and others were sued for damages. Plaintiff having been successful at the trial, the defendants appealed. The reviewing court held that:

(1) The policy of the state being to promote commerce by facilitating the sale and transfer of property, contracts in partial restraint of trade are not regarded as unreasonable when they are ancillary to an actual purchase of property, made in good faith, and necessary to afford protection to the purchaser; (83 N. W. 842, 843)

(2) "A covenant in a deed for the exchange of hotel properties, by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void, as being contrary to public policy;" (syl. 6)

(3) "An innkeeper is not clothed with any authority from the state, and he owes no duty to the public, except to render to all who come, and are fit to be received, fair accommodations, at fair prices, while he sees fit to remain in business;" (p. 843½)

(4) "If a party waive a covenant conditionally, and the

condition is broken, the waiver ceases to be effective for any purpose;" (syl. 9)

(5) "A party may recover for gains prevented, as well as for losses sustained, when such damages are not only certain, but are the natural and probable result of the wrong complained of;" (syl. 12)

(6) The rule which forbids an appellate court on a subsequent appeal of a case to reconsider and correct an erroneous decision made by it on a former appeal applies only to matters directly decided, and does not extend to mere expression of opinion in matters not actually involved; (p. 843)

(7) "It is not necessarily prejudicial error to receive evidence to prove admitted facts;" (syl. 8)

(8) "The reception of evidence which responds to no issue in the case, but which is incapable of mischief, is not reversible error;" (syl. 10)

(9) "The best evidence of which a case is in its nature susceptible is always admissible to prove the fact in issue;" (syl. 11)

(10) "A party to avail himself of an error of the court in refusing to permit a witness on direct examination to answer a question, must make a formal offer to prove the fact sought to be elicited;" (syl. 13) and

(11) "It is not error to refuse to receive evidence of facts admitted by the pleadings." (syl. 14)

MEMORANDUM DECISIONS.

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1.

ALBERS COMMISSION CO. v. SPENCER et al.

(— Mo. —, 103 S. W. 523, 1907.)

This case holds that: (1) A contract made and to be performed in a state is not within the Sherman anti-trust act; (2) one injured through an illegal combination or contract can proceed under section 8981, Rev. Stat., by an action for damages; and (3) unless otherwise provided, the remedy given by Missouri anti-trust statutes for a violation of a right created by them is exclusive of all other remedies.

2.

ALGER v. THACHER.

(19 Pick. 51, 31 Am. Dec. 119, Mass. 1837.)

A contract excluding a party making it from participation in his trade or business everywhere and at all times is void, whether such contract is or is not under seal.

3.

AMERICAN BANANA CO. v. UNITED FRUIT CO.

(153 Fed. 943, U. S. C. C., N. Y. 1907.)

This case decides that: (1) An action for damages under section 7 of the Sherman Act is penal in its nature; and (2) at the trial of an action under section 7, Sherman Act, a corporation may be compelled by virtue of section 724, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 583) to produce books and papers.

4.

AMERICAN BRAKE BEAM CO. v. PUNGS.

(141 Fed. 923, U. S. C. C. A., Ill. 1905.)

It was held in this case that: (1) An agreement by an inventor, as part of the sale of his invention or patent, not to engage in the United States in future improvements in the branch of business to which the invention applies, during the life of such patent, is not in restraint of trade; and (2) whether a given contract is in restraint of trade depends as much upon the nature of the business sought to be restrained as upon the elements of time and place.

5.

AMERICAN SODA-FOUNTAIN CO. v. GREEN et al.

(69 Fed. 333, U. S. C. C., Pa. 1895.)

In an action for an infringement of a patent and for an accounting, the defense that the complainant constitutes a combination in restraint of trade is irrelevant and immaterial and on motion will be stricken out as impertinent.

6.

ANGELICA JACKET CO. v. ANGELICA.

(— Mo. —, 98 S. W. 805, 1906.)

The foregoing case holds that: (1) A contract whereby, on the sale of a business, the seller agrees not to engage for a limited period in a similar business to the one sold in any of the states and territories in which such business was carried on previous to such sale is not void as in restraint of trade; and (2) a contract binding the vendor of a business not to engage in a similar business within an entire state, when made in part consideration of the sale and when it is necessary to protect the purchaser's interests, is not void as in restraint of trade.

7.

ATTORNEY GENERAL v. CONSOLIDATED GAS CO. OF NEW YORK.

(108 N. Y. Supp. 823, 1908.)

This was an application by the attorney general under section 1798, Code of Civil Procedure, for leave to bring an action against the Consolidated Gas Company of New York to forfeit its charter. In affirming an order denying permission it was held that: (1) The granting of an application by the attorney genetral under section 1798, Code of Civil Procedure, for leave to bring an action against a corporation for the forfeiture of its charter, rests in the sound discretion of the court, it being the court's duty to seriously consider whether, upon the facts presented, the public interests require that such an action shall be brought; (2) the consolidation of several competing gas companies under chapter 367, p. 448, Laws 1884, is not prohibited by the anti-monopoly laws of New York, because the price and production of gas is regulated by law; (3) the purchase of stock for the purpose of preventing competition is not of itself necessarily illegal; (4) the only kind of monopoly prohibited by the anti-trust laws of New York is that which results in limiting production and enhancing prices of a commodity; and (5) an application under section 1798, Code of Civil Procedure, by the attorney general for leave to begin an action against a corporation to forfeit its charter, must show that, as a result of the acts complained of, some specific injury has been or is being done to the public.

Laughlin, J., dissented on the grounds: (a) that under section 1798, Code of Civil Procedure, it is within the discretion of the attorney general, and not the court, whether or not an action against a corporation, for the purpose of forfeiting its charter, shall be instituted and that he was required only to show a *prima facie* cause for such action in order to obtain the court's leave; and (b), that in the particular application before the court there was shown to exist a clear purpose to create a monopoly and restrain competition in the business in which the corporations were engaged.

8.

BELL v. LEGGETT.

(7 N. Y. 176, 1852.)

All contracts or agreements which are repugnant to justice, or are against the policy of the common law, or are contrary to the provisions of any statute, are void and unenforcible.

9.

BOBBS-MERRILL CO. v. STRAUS et al.

(147 Fed. 15, U. S. C. C. A., N. Y. 1906.)

A combination between individual owners of patented or copyrighted articles or books to limit their production, control prices, and stifle or prevent competition, is just as illegal as any other combination of owners of non-patented or non-copyrighted articles or books, having similar purposes. See 139 Fed. 155.

10.

BROWN v. ROUNSAVELL.

(78 Ill. 589, 1875.)

An agreement between a manufacturer or wholesaler and a dealer whereby the latter agrees to purchase a certain make or brand of goods exclusively from the former is not unlawful.

11.

BUFFALO LUBRICATING OIL CO. v. STANDARD OIL CO.

(106 N. Y. 669, 12 N. E. 825, 1887.)

A corporation may be guilty of a conspiracy the same as of any other tort.

12.

CARNIG v. CARR.

(167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 1897.)

An agreement, as part of a contract of employment, on behalf of the one employed to give up his business and not to re-engage in the same so long as he shall continue in the service of the employer is valid and is not against public policy.

13.

CARROLL v. GILES.

(30 S. C. 412, 9 S. E. 422, 4 L. R. A. 154, 1889.)

A promise not to engage in a trade for an unlimited period within a specified place, when not part of the sale of a business or good will, is unreasonable and void.

14.

CARTER et al. v. ALLING et al.

(43 Fed. 208, U. S. C. C., Ill. 1890.)

In this case it was held that: (1) It is lawful for an employer to bind an employe not to go into the employ of a competitor for a reasonable time after his employment terminates, within the territory where the employer seeks his market, although the same may cover the entire United States; and (2) whether a contract or covenant is or is not in unreasonable restraint of trade is a judicial question depending upon the particular facts and circumstances of each case.

15.

CLARK et al. v. NEEDHAM et al.

(125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559, 1900.)

A contract between two competing manufacturers of an article, requiring one of them to cease manufacturing such

article for one year in consideration of a sum of money, with a four years' privilege of renewal, when unlimited as to territory, is void as against public policy, although it is limited as to time and subject-matter.

16.

COMMONWEALTH v. GRINSTEAD et al.

(23 Ky. Law. Rep. 590, 111 Ky. 203, 63 S. W. 427, 56 L. R. A. 709, 1901.)

A contract between a manufacturer and jobber whereby the manufacturer places a fixed minimum selling price at which his goods may be sold by the jobber, requiring him not to resell the goods at a lower price, is not within the prohibition of section 3915, Ky. Stats.

17.

CONGRESS & EMPIRE SPRING COMPANY v. KNOWLTON.

(103 U. S. 49, 26 L. ed. 347, N. Y. 1881.)

Upon prohibition of a contract which is immoral, *malum prohibitum*, money paid, or goods delivered thereunder may be recovered back so long as such contract remains executory.

18.

CRAWFORD v. WICK.

(18 Ohio St. 190, 98 Am. Dec. 103, 1868.)

Whenever a contract in partial restraint of trade has the effect of injuring, or has a tendency to injure, third persons or the public, the contract is unenforcible.

19.

DELAWARE, L. & W. R. CO. v. KUTTER et al.

(77 C. C. A. 315, 147 Fed. 51, U. S., N. Y. 1906.)

A contract granting an exclusive trade privilege or license for the purpose of furthering one's business, when such privilege does not injuriously affect the general business concerning which the privilege is granted, is neither against public policy nor within the Sherman anti-trust law, if the business is of an interstate character.

20.

DeWITT WIRE-CLOTH CO. v. NEW JERSEY WIRE-CLOTH CO.

(14 N. Y. Supp. 277, 1891.)

This case holds that: (1) An arrangement between manufacturers of a commodity which has the effect of restricting competition in trade by arbitrarily enhancing the price of such commodity is contrary to public policy and illegal; and (2) a counter-claim arising out of an illegal contract or transaction is unenforcible, upon the maxims, *ex pacto illicito non oritur actio* (from an illicit contract no action arises), and *in pari delictio potior est conditio possidentis* (where both parties are equally in fault, the condition of the defendant is preferable).

21.

DR. MILES MEDICAL CO. v. JAYNES DRUG CO. et al.

(149 Fed. 838, U. S. C. C., Mass. 1906.)

Until voluntary disclosure or lawful discovery, the owner of a trade secret or formula has an exclusive right similar to that arising out of a patent or copyright, to make, use, and vend articles manufactured thereunder, and contracts relating to the disposition and sale of such articles are neither within the doctrine of restraint of trade at common law nor invalid under the Sherman anti-trust act.

22.

DOLPH v. TROY LAUNDRY MACHINERY CO.

(28 Fed. 553, U. S. C. C., N. Y. 1886.)

It is not against public policy for two competitors in an article which does not constitute a necessity to agree to maintain prices of such article and divide profits, when there is no conspiracy to create a monopoly and such contract has no such tendency.

23.

EDISON PHONOGRAPH CO. et al. v. KAUFMANN et al.

(105 Fed. 960, U. S. C. C., Pa. 1901.)

EDISON PHONOGRAPH CO. et al. v. PIKE.

(116 Fed. 863, U. S. C. C., Mass. 1902.)

The owner of a patent may restrict the resale of his patented article by a jobber as to the persons to whom and the prices at which it may be sold; and any dealer having notice of these conditions who, in purchasing the patented articles from a jobber thus bound, disregards them, is an infringer.

24.

EDWARDS COUNTY v. JENNINGS et al.

(89 Tex. 618, 35 S. W. 1053, 1896.)

This case holds that: (1) The giving by a municipal corporation of a ten years' privilege to supply the town with water and lay piping therefor tends to create a monopoly and is void under the constitution, article 1, section 26; and (2) a contract is void as a whole when it is based upon several considerations one of which is unlawful, whether the illegality be at common law or by statute.

25.

EMERY et al. v. OHIO CANDLE CO.

(47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819, 1890.)

This case decides that: (1) A voluntary association formed for the purpose of increasing the price and decreasing the production of a commodity of general use is contrary to public policy; and (2) a claim arising out of an agreement in restraint of trade is unenforcible.

26.

ESPENSON v. KOEPKE.

(93 Minn. 278, 101 N. W. 168, 1904.)

A covenant on behalf of the seller of a business, in part consideration of its sale, that he will refrain from conducting the same business within certain limits during a specified period, when the restraint is such as is necessary to afford a fair protection to the purchaser and is not so large as to interfere with the interests of the public, is neither in general restraint of trade nor within Minnesota anti-trust laws of 1899, chapter 359.

27.

FAIRBANK et al. v. LEARY.

(40 Wis. 637, 1876.)

This case holds that: (1) A secret agreement between independent dealers made for the purpose of preventing competition is unlawful and void; and (2) an agreement of a partner not to engage on his individual account in the kind of business for the transaction of which the partnership was formed, within a certain locality, is not in restraint of trade, and is therefore valid.

28.

FRANCIS T. SIMMONS & CO. v. TERRY.

(79 S. W. 1103, Tex. Civ. App. 1904.)

A contract between a manufacturer or wholesaler and a dealer whereby the wholesaler binds himself to sell exclusively to the dealer a certain commodity within a limited locality and during a specified time, and the dealer agrees not to purchase such commodity from any other manufacturer or wholesaler during the time and in the place specified, entered into for the purpose of preventing competition and creating a monopoly in the purchase and sale of such commodity, is in violation of the anti-trust act of 1899, and unenforcible.

This case was criticized by the supreme court in 91 S. W. 781.

29.

FREED v. AMERICAN FIRE INSURANCE CO.

(— Miss. —, 43 So. 947, 11 L. R. A. (N. S.) 368. 1907.)

The right of subrogation under equitable principles is independent of a stipulation for subrogation in a policy of insurance and is unaffected by the fact that the insurance company seeking the enforcement of such right is a trust or combination or member thereof.

30.

FULLINGTON et al. v. KYLE LUMBER CO.

(139 Ala. 242, 35 So. 852, 1904.)

An agreement not to compete with another in business nor to permit others to compete with him, in consideration of a sum of money, when not part of the sale of the business and its good will, is in restraint of trade, and void as against public policy.

31.

GARST v. HARRIS.

(177 Mass. 72, 58 N. E. 174, 1900.)

The control by a manufacturer under a secret process or composition of the prices at which the manufactured article shall be sold or resold by others, is not in restraint of trade and against public policy.

32.

GATES v. HOOPER.

(90 Tex. 563, 39 S. W. 1079, 1897.)

The case decides that: (1) "In order to constitute a trust, within the meaning of the statute (Rev. St. 1895, art. 5313), there must be a 'combination of capital, skill or acts by two or more'—'combination,' as here used, means union or association;" and (2) a covenant by the seller of a business not to engage in the same business for a definite period within a limited territory is not within Texas anti-trust laws of 1889.

33.

GENERAL ELECTRIC CO. v. WISE.

(119 Fed. 922, U. S. C. C., N. Y. 1903.)

It is no defense to a proceeding for infringement of a patent that the complainant is a member of a combination in restraint of trade, the maxim, "He who comes into equity must do so with clean hands," being inapplicable.

34.

GLOUCESTER ISINGLASS & GLUE CO. v. RUSSIA CEMENT CO.

(154 Mass. 92, 27 N. E. 1005, 1891.)

A contract between manufacturers able to control the manufacture of a certain article under a secret process, to

unite for the purchase of raw material entering into the manufacture of such article, and to agree upon prices at which the manufactured article shall be sold, for the purpose of avoiding competition between them in the purchase of raw material and to secure reasonable profit from the manufacture of the article, when such an article is not of prime necessity or a staple commodity, is not in restraint of trade and against public policy.

35.

GOOD v. DALAND et al.

(121 N. Y. 1, 24 N. E. 15, 1890.)

An agreement by an inventor of a patent, based upon a valuable consideration, to confine the sale and use of all his methods and machinery then or thereafter to be invented and patented to members of an association, is not illegal as being in restraint of trade, although the members do not agree to use such machinery, and the practical effect of such an agreement is to take the machinery out of use, unless the members themselves use or permit others to use it.

36.

HANNAH et al. v. FIFE et al.

(27 Mich. 172, 1873.)

This case involved the doctrine that a secret arrangement or combination between bidders to share profits to be derived by a successful bidder at a public letting is against public policy and void.

37.

HARRIS et al. v. THEUS.

(— Ala. —, 43 So. 131, 1907.)

This case holds that: (1) An agreement in a lease of land adapted to certain business purposes that the lessor

will not engage in the business for which the land is leased so long as the lessee shall continue in business within a limited locality, when the nature of the business and the purposes of the contract afford only a fair protection to the interests of the lessee without being so large as to interfere with the public, is valid; and (2) a restrictive covenant to continue so long as the covenantee shall remain in business is valid as to the duration of the covenant.

38.

HARVEY v. LINVILLE IMPROVEMENT CO.

(118 N. C. 693, 24 S. E. 489, 1896.)

In the foregoing case a majority of the stockholders, some of whom were also creditors of a corporation which was in the hands of a receiver, entered into an agreement to place their shares of stock with three trustees for five years, giving them the power to vote and pledge such stock as collateral for loans, and it was held that any combination or device by which any number of stockholders combine to place the voting of their shares in the irrevocable power of another is contrary to public policy.

39.

HASTINGS INDUSTRIAL CO. v. BAXTER et al.

(— Mo. App. —, 102 S. W. 1075, 1907.)

A subscription to the capital stock of a corporation formed as part of an arrangement to create a combination to destroy competition in and enhancing the price of a commodity is unenforcible against the so-called stockholders who participated in such scheme; such subscription being void under section 8966, Rev. St. 1899 (Ann. St. 1906, p. 4152).

40.

HEIMBUECHER v. GOFF, HOMER & CO.

(119 Ill. App. 373, 1905.)

A contract between two corporations whereby one of them binds itself to purchase *all* of its raw material from,

and to sell *all* of its manufactured products to another corporation, in the absence of an allegation or proof showing that such contract tends to produce a monopoly, or is in restraint of trade, by enabling the parties thereto, or either of them, to monopolize the market, is valid.

41.

HOMER v. GRAVES.

(7 Bing. 735, Eng. 1831.)

Whether a contract in restraint of trade is reasonable or not must be determined by the protection it affords to the party in whose favor it operates: if the restraint is only such as to afford a fair protection to such party, and is not so large as to interfere with the interests of the public, the contract is valid; if, on the other hand, the restraint is larger than the necessary protection of the party demands, it is of no benefit to either, is necessarily unreasonable, is injurious to the interests of the public, and therefore is void on the ground of public policy.

42.

In re ATTORNEY GENERAL.

(155 N. Y. 441, 50 N. E. 57, 1898.)

An order for the examination of witnesses based upon an application of the attorney general under New York Laws, 1897, chapter 383, made preliminary to the bringing of an action under said statute, is not appealable; as the only provision (sec. 3334) of the Code conferring appellate jurisdiction upon the court of appeals in special proceedings relates to the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and the sole object of an order founded upon the application made under chapter 383, Laws 1897, is the perpetuation of testimony that the witnesses may give, and the obtaining of the information that it may disclose—the proceeding terminating with the taking of the testimony and the filing of the order with the officer designated by the statute—and therefore does not constitute a special proceeding within the meaning of said provision of the Code.

43.

In re BLAKE.

(150 Fed. 279, U. S. C. C. A., Mo. 1906.)

This case decides that: (1) Any contract or transaction induced by a combination to suppress competition at a public sale required by law is voidable at the election of the vendee and vests in him the legal right to recover from any of the conspirators the value of all the benefits he has received thereunder; and (2) "any combination of bidders to suppress competition at a public sale required by law is a fraudulent conspiracy in restraint of trade and contrary to public policy."

44.

In re GRAND JURY.

(62 Fed. 840, U. S. D. C., Cal. 1894.)

The foregoing charge holds that: (1) Any combination or conspiracy on the part of any class of persons who by violence and intimidation restrain trade or commerce among the several states or with foreign nations is within the prohibitions of the Act of July 2, 1890; (2) trade signifies the exchange of commodities for other commodities or for money, the business of buying and selling, dealing by way of sale or exchange: and (3) commerce means intercourse and traffic between states and their citizens "and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities."

45.

In re PINKNEY et al.

(47 Kan. 89, 27 Pac. 179, 1891.)

This case decides that: (1) The Kansas anti-trust act of 1889, chapter 257, in so far as it relates to the business of insurance, is constitutional; and (2) the word "trade," in its broadest sense, means any occupation or business carried on for subsistence or profit and embraces the business of insurance.

46.

In re SALMON et al.

(145 Fed. 649, U. S. D. C., Mo. 1906.)

An arrangement between the principal bankers of a locality whereby bids for public moneys are to be submitted so that one of them shall become a depositary and the others may use such funds at the same rate as is fixed by the award is a fraud upon the municipality seeking competitive bidding and is void as against public policy. See 150 Fed. 279.

47.

In re TERRELL.
UNITED STATES v. GREENHUT et al.

(51 Fed. 213, U. S. C. C., N. Y. 1892.)

The mere giving of rebates or inducements to purchasers upon condition that they shall deal exclusively with the seller and shall resell at prices fixed by him is not forbidden by the Sherman anti-trust law.

48.

J. H. ARNOLD & CO. v. JONES COTTON CO.

(— Ala. —, 44 So. 662, 1907.)

A secret arrangement between competing dealers in a commodity for an interest in each other's purchases has the effect of deceiving the sellers of such commodity and stifling competition between the buyers of or dealers in the same, and is therefore in restraint of trade and void as against public policy.

49.

JAYNE & KEVE BROS. LUMBER CO. v. TURNER & SON.

(109 N. W. 307, Ia. 1906.)

A contract not to engage in business in a certain locality, if reasonable and based upon sufficient consideration, is valid and enforcible.

50.

JONES v. CARTER.

(101 S. W. 514, 65 Cent. Law J. 282, Tex. Civ. App. 1907.)

This case decides that: (1) A stipulation in a deed of dedication perpetually reserving to the grantor or grantors the exclusive control over the dedicated streets and alleys for water, sewerage, light, telegraph, telephone, and street railway purposes, is inconsistent with the dedication and is void as against public policy; and (2) the word "monopoly" embraces any combination or contract, irrespective of its form, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public.

51.

JONES v. FELL.

(5 Fla. 510, 1854.)

An agreement between all of the pilots in a locality, in the form of an association or partnership, not affecting competition between them, and when charges for their services are regulated and controlled by a board of port wardens, is not against public policy.

52.

KEENE SYNDICATE v. WICHITA GAS, ELECTRIC LIGHT & POWER CO.

(69 Kan. 284, 76 Pac. 834, 105 Am. St. Rep. 164, 1904.)

This case holds that: (1) A lease by a *quasi*-public corporation of its plant and machinery to a competing company with an agreement not to compete with such company during the term of the leasehold is in restraint of trade and void as against public policy; (2) any contract between corporations engaged in business of a public nature, whereby competition is prevented to any extent, is prejudicial to the public interests and is void as against public policy; and (3) contracts and agreements when contrary to public policy are absolutely void and are unenforcible.

53.

KNAPP v. S. JARVIS ADAMS CO.

(135 Fed. 1003, U. S. C. C. A., Ohio. 1905.)

The foregoing case decides that: (1) The territorial restrictions in a contract or covenant against competition may be such as the business involved requires; and (2) whether in a particular case the restriction is so manifestly opposed to public policy as to outweigh that interest which the public has in the freedom of trade and commerce and the inviolability of contracts is a vital question in determining the reasonableness of the restriction.

54.

KOSCIUSKO OIL MILL & FERTILIZER CO. v. WILSON COTTON OIL CO.

(— Miss. —, 43 So. 435, 8 L. R. A. (N. S.) 1053, 1907.)

A contract to withdraw competition from a competitor's territory in consideration of a sum of money or property, having the effect of securing a monopoly in the business to the one in whose favor the withdrawal operates, is void under section 3, chapter 88, Missouri laws, 1900.

55.

KRADWELL et al. v. THIESEN et al.

(— Wis. —, 111 N. W. 233, 1907.)

The purchase by an individual of a stockholder's interest in a private corporation affords a sufficient consideration for a contemporaneous agreement by the seller not to engage in the business carried on by the corporation for a limited period and within a specified place.

56.

LEONARD v. ABNER-DRURY BREWING CO.

(25 App. D. C. 161, D. C. 1905.)

The remedies provided by the Sherman anti-trust act against its violation are not exclusive and do not impair the ordinary jurisdiction of courts of equity where criminal acts work special irreparable injury to property.

57.

LOEWE & CO. v. LAWLOR et al.

(130 Fed. 633, U. S. C. C., Conn. 1904.)

Federal courts have exclusive jurisdiction over actions for treble damages under section 7 of the Sherman anti-trust act.

58.

LOWENSTEIN v. EVANS et al.

(69 Fed. 908, U. S. C. C., S. C. 1895.)

The state by assuming a monopoly over a commodity, does not thereby enter into a contract, combination or conspiracy under the Sherman anti-trust act, nor is the state a "person" or corporation within the meaning of that Act.

59.

LYTLE et al. v. GALVESTON, HARRISBURG & SAN ANTONIO RY. CO. et al.

(— Tex. —, 99 S. W. 396, 1907.)

The mere agreement of a number of railroad companies at the request of associations or citizens, to issue non-transferable excursion tickets at a reduced rate for a return trip

upon certain occasions, when competition in their sale between the companies is in no way thereby affected, is neither within the Federal nor Texas anti-trust laws.

60.

MANDEVILLE v. HARMAN.

(— N. J. L. —, 7 Atl. 37, 1886.)

This case holds that: (1) A provision not to engage in the practice of medicine or surgery in a certain locality at any time thereafter is in unlawful restraint of trade and therefore void; (2) contracts in restraint of trade are valid only when the restraint they impose is reasonable; and (3) whether a particular restraint is reasonable or unreasonable depends upon the fair protection it affords to the interest of the party in whose favor it operates, and whenever the restraint is larger than this protection it is of no benefit to either and may be oppressive, and if oppressive, it is in the eye of the law unreasonable and void on the ground of public policy as being injurious to the public interests.

61.

MATTHEWS v. ASSOCIATED PRESS.

(136 N. Y. 333, 32 N. E. 981, 1893.)

A by-law restricting the members of a private corporation to dealing with it alone in order to promote any of its corporate purposes and enhancing the value of its property is not in unreasonable restraint of trade.

62.

MINES v. SCRIBNER et al.

(147 Fed. 927, U. S. C. C., N. Y. 1906.)

This case decides that: (1) Where independent publishers, controlling ninety per cent of the book business of the country, through an association establish and maintain uni-

form prices of copyrighted and uncopyrighted books by black-listing dealers who fail to keep up prices, and thereby prevent them from purchasing books from any of such publishers they are guilty under the Sherman anti-trust act of a conspiracy or combination in restraint of interstate trade; and (2) one copyright owner has not the right, under the copyright law, to combine with other owners of copyrights to control the price of his or their articles.

63.

MISSOURI PACIFIC RY. CO. v. TEXAS & PACIFIC RY. CO.

(30 Fed. 2, U. S. C. C., La. 1887.)

When it comes to the notice of a court that its receiver is violating the law by carrying out an unlawful arrangement or contract in restraint of trade, such court will upon its own motion direct the receiver to withdraw and abandon such contract or arrangement.

64.

MOLONEY v. AMERICAN TOBACCO CO.

(72 Fed. 801, U. S. C. C., Ill. 1896.)

An information in equity to restrain the violation of a state anti-trust law is a criminal, and not a civil proceeding.

65.

MURPHY et al. v. CHRISTIAN PRESS ASS'N. PUB. CO.

(38 App. Div. 426, 56 N. Y. Supp. 597, 1899.)

The doctrine of restraint of trade has no application to direct contracts between publisher and author with reference to the price at which copyrighted productions shall be sold.

66.

MY LAUNDRY CO. v. SCHMELING.

(129 Wis. 597, 109 N. W. 540, 1906.)

The points decided in this case are: (1) A provision binding the seller of a laundry business from re-engaging in such business "in any manner, either by conducting a laundry establishment on his own behalf or in conjunction or jointly with any other persons, or by entering the employ of any person, firm or corporation engaged in such business, in the capacity of an officer, manager, solicitor, or any other capacity whatsoever" is limited to the kind of business sold and is not so broad as to invalidate the entire provision; (2) whether a contract in restraint of trade is reasonable or unreasonable is a matter of law to be determined from the writing, having regard to the limitations as to the time, place, purpose, and scope of the restraint; (3) reasonableness of restraint between parties has reference to time, space, purpose, and scope; the time and space must not be so great as to have the effect of a general restraint, the purpose must have reference to the protection of the business sold, or in which the party restrained is in some capacity engaged, and which is reasonably benefited by the restraint, and the scope of restraint must be germane to such purpose; (4) before instituting an action to enjoin a breach of a vendor's covenant not to compete, all that is necessary is that an actual breach of the agreement shall exist—it not being essential that actual injury should have been caused; and (5) in a suit to enjoin a breach of a vendor's covenant not to compete with the vendee, it is unnecessary to expressly allege that the restraint imposed upon the defendant is a necessary one, the implication of such an agreement being that it is material to the vendee's protection.

67.

NATIONAL ENAMELING & STAMPING CO. v. HABERMAN.

(120 Fed. 415, U. S. C. C., Conn. 1903.)

This case sweeps away all distinction between general and partial restraint of trade and limits the doctrine or

rule to reasonableness of restraint in each particular case. The doctrine announced here is that a restrictive covenant, made by one capable of contracting, which is unlimited as to time, covers the entire United States, is ancillary to the main lawful contract, being in part consideration of the good will sold, and is no broader than is necessary to save the covenantee the rights and privileges for which he has paid, is valid and enforcible.

68.

NATIONAL HARROW CO. v. QUICK.

(67 Fed. 130, U. S. C. C., Ind. 1895.)

This case holds that: (1) Contracts in general and unlimited restraint of trade are against public policy and unlawful: and (2) the title to property acquired by an unlawful combination is unenforcible in equity even against a stranger, when making any decree or order with reference thereto would in any way aid the purposes of such combination.

The foregoing case was criticized in 69 Fed. 334, and in 71 Fed. 302, 306.

69.

NATIONAL PHONOGRAPH CO. v. SCHLEGEL et al.

(64 C. C. A. 594, 128 Fed. 733, U. S., Ia. 1904.)

This case holds that: (1) The owner or assignee of a patent may within the scope of his monopoly restrict the use or resale of the patented article, such restriction being binding upon all having notice thereof; and (2) restraints imposed by the owner of a patent upon his assignee or licensee as to the sale or use of the patented article are not within the Sherman anti-trust law.

70.

NEW YORK BANK NOTE CO. v. KIDDER PRESS MFG. CO.

(— Mass. —, 78 N. E. 463, 1906.)

This case decides that: (1) A restriction in the use or sale of an article is not unlawful when such restriction is neces-

sary to the protection of the manufacturer or producer of such article; and (2) the defense that a contract is void under the Sherman anti-trust act, to be available, must be specially pleaded.

71.

OLIVE et al. v. VAN PATTEN et al.

(7 Tex. Civ. App. 630, 25 S. W. 428, 1894.)

This case decides that: (1) An infringement of a patent being a tort, in an action against an infringer the defendant cannot set up as a defense that the plaintiff is an unlawful combination under the Sherman anti-trust act; and (2) a petition or complaint charging defendants with having unlawfully and maliciously influenced third persons not to deal with plaintiffs to their injury states a good cause of action of civil conspiracy.

72.

OTIS ELEVATOR CO. v. GEIGER et al.

(107 Fed. 131, U. S. C. C., Ky. 1901.)

The defense that the plaintiff constitutes an unlawful combination should explicitly and exactly show that the plaintiff is such a combination, giving all the necessary particulars, the averments to be made in such clear terms as to show that the defendant under the law and upon the facts stated can thereby defeat an action against him which might otherwise be meritorious, in order that the plaintiff may know precisely what he is to meet.

73.

PACIFIC FACTOR CO. v. ADLER.

(90 Cal. 110, 25 Am. St. Rep. 102, 1891.)

A contract for the exclusive handling of a manufacturer's or wholesaler's goods on commission, when not part of a scheme to restrain trade or create a monopoly, is valid.

74.

PEOPLE v. AACHEN & MUNICH FIRE INSURANCE CO. et al.

(126 Ill. App. 636, 1906.)

A combination between fire insurance companies to regulate and maintain uniform insurance rates and prevent competition amounts to a common law conspiracy and may be enjoined at the instance of the state.

75.

PEOPLE v. AMERICAN ICE CO.

(105 N. Y. Supp. 650, April, 1907.)

Where the successful outcome of subsequent proceedings against an alleged monopoly depends to a great extent upon the state's ability to show the history of the organization of the defendant, if a corporation, its original and subsequent capitalization, assets, liabilities, cost of operation, earnings, dividends, original and after-acquired plant, agencies, sources of supply, and agreements theretofore made, even though not in force, an order upon an application made by the attorney general under the New York anti-trust laws of 1899 may grant the attorney general wide latitude in the examination, not only for the purposes of proper and ample preparation, but also to facilitate the presentation of proofs on the trial, notwithstanding that each individual transaction, agreement, or business arrangement, standing by itself, may be entirely lawful, but when considered in connection with all the transactions and agreements, and the uses and purposes to which they are put, it may be found that, taken together, they constitute an illegal scheme to prevent competition.

76.

PEOPLE v. AMERICAN ICE CO.

(104 N. Y. Supp. 858, June, 1907.)

In a proceeding to annul contracts made with a view to establishing a monopoly, and to restrain the commission of

similar acts in the future, an order upon the defendant to produce books and papers for inspection should not be too broad or general, but should confine itself to contracts and correspondence had wih persons or corporations with whom such contracts were made, or their agents, including letter-press copies of letters sent by the defendant.

77.

PIDCOCK v. HARRINGTON.

(64 Fed. 821, U. S. C. C., N. Y. 1894.)

The only persons who may bring suits in equity to restrain acts forbidden by the Federal anti-trust law, are the United States district attorneys.

78.

POST v. SOUTHERN RY. CO.

(103 Tenn. 184, 52 S. W. 301, 1899.)

State courts can not, under their general equity juristion, enforce the provisions of the Federal anti-trust laws.

See page 481 *ante*.

79.

PRESCOTT & ARIZONA CENTRAL RAILROAD CO. v. ATCHISON, TOPEKA & SANTA FE RAILROAD CO.

(73 Fed. 438, 84 Fed. 213, U. S. C. C. & C. C. A., N. Y. 1896–97.)

An arrangement between several railroad corporations whereby one of them is selected and employed to act as their exclusive agent for sending of freight and passengers beyond their own lines, or for receiving of freight and passengers on its lines to be transmitted to their own lines upon through bills and tickets, is not unlawful either under the common law or by virtue of the Federal anti-trust law.

80.

RICE v. ROCKEFELLER et al.

(8 Ry. & Corp. Law J. 129, 9 N. Y. Supp. 866, 1890.)

Where a purchaser of trust certificates of a voluntary association has not complied with conditions providing for their transfer on the books of the trustees, equity will not compel the transfer by the trustees at the instance of such certificate holder.

81.

ROBINSON v. SUBURBAN BRICK CO.

(127 Fed. 804, U. S. C. C. A., W. Va. 1904.)

This case holds that: (1) Contracts or combinations concerning the business of manufacturing within a state are unaffected by the Sherman anti-trust law; and (2) a covenant by a vendor of a business, given as part consideration of its sale, not to carry on the particular business within a limited territory and for a limited time, is valid.

82.

ROURKE v. ELK DRUG CO.

(75 App. Div. 145, 77 N. Y. Supp. 373, 1902.)

Any person suffering special injury on account of any act done in furtherance of the objects of a combination prohibited by the New York anti-trust act of 1899, chapter 690, has the right of action for damages.

83.

SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO.

(108 Cal. 549, 41 Pac. 495, 1895.)

This case holds that: (1) Not all agreements or combinations restricting competition are illegal at common law; and

(2) a "monopoly signifies the sole power of dealing in a particular thing or doing a particular thing, either generally or in a particular place."

84.

SCHULTEN v. BAVARIAN BREWING CO.

(96 Ky. 224, 28 S. W. 504, 1894.)

This case decides that: (1) It is not unlawful for several tradesmen to confederate together to protect themselves by lawful acts from dishonest debtors; (2) in charging or setting forth a criminal conspiracy there must be facts showing the combination or confederation on the defendants' part to do an unlawful act by reason of which a civil right of the plaintiff was infringed and an injury to his person, reputation or business sustained; and (3) facts, and not the pleader's conclusions, must be alleged.

85.

SEATTLE ELECTRIC CO. v. SNOQUALMIE FALLS POWER CO.

(40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032, 1905.)

While courts of equity will not enforce contracts entered into through any violation of positive law or a rule of public policy where the interests of the parties thereto are alone involved, when the public's interests are concerned such contracts are enforcible in equity as long as such public interest requires it.

86.

S. JARVIS ADAMS CO. v. KNAPP.

(58 C. C. A. 1, 121 Fed. 34, U. S., Ohio, 1903.)

Whenever the sale of some right or thing may be affected by the subsequent conduct of the seller, a stipulation by the

seller that he will refrain from such conduct is valid; although one cannot stifle competition by a bargain having that purpose alone.

87.

SOUTHERN COTTON OIL CO. v. TEXAS.

(25 Sup. Ct. Rep. 383, 197 U. S. 134, 49 L. ed. 696, Tex. 1905.)

The questions involved in this case and in that of National Cotton Oil Company v. Texas, 197 U. S. 115, 49 L. ed. 689, are identical and were decided on the authority of the last mentioned case.

88.

SOUTHERN INDIANA EXPRESS CO. v. UNITED STATES EXPRESS CO.

(88 Fed. 659, U. S. C. C., Ind. 1898.)

Injunctive relief against an alleged combination in restraint of trade is not available to a private party under the Federal anti-trust law.

89.

SOUTH FLORIDA R. CO. v. RHOADS.

(25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 1889.)

The question as to whether an agreement was entered into *bona fide* and not for the purpose of oppressive monopoly is a mixed question of law and fact, and is one for the jury.

90.

SPRIGG et al. v. BALTIMORE & OHIO RAILROAD CO. et al.

(8 Interst. Com. Rep. 443, 1900.)

The Interstate Commerce Commission has no jurisdiction over violations of the Sherman anti-trust law.

91.

SPRINGFIELD FIRE & MARINE INS. CO. v. CANNON.

(46 S. W. 375, Tex. Civ. App. 1898.)

An owner's right to insure his property is unaffected by the fact that he is a member of a combination in restraint of trade.

92.

STANDARD FIREPROOFING CO. v. ST. LOUIS EXPANDED METAL FIREPROOFING CO.

(177 Mo. 559, 76 S. W. 1008, 1903.)

A contract for the exclusive use of a patented device during the life of certain patents, and extension or reissue within a limited territory in part consideration of which the licensee agrees not to use or sell any similar device, is not void as in restraint of trade

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93.

STATE v. AMERICAN COTTON OIL TRUST et al.

(40 La. Ann. 8, 1888.)

GOULD v. HEAD et al.

(41 Fed. 240, U. S. C. C., Colo. 1890.)

Certificates of stock, although issued and held by an illegal trust or combination, represent an interest in the property of the combination giving them a legal and real value, and are subject to sale irrespective of their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, and whether or not they confer any right to participate in the carrying on of any illegal business; and a sale of such stock by a stock dealer will not be interfered with by injunction.

94.

STATE v. DREANY.

(65 Kan. 292, 69 Pac. 182, 1902.)

This case holds that: (1) The information in a prosecution of a conspiracy in restraint of trade should allege the names of all those parties to the conspiracy known to the prosecuting officer, but it is not necessary that all of such parties should be jointly charged with the commission of the offense; (2) upon the prosecution of a criminal conspiracy in restraint of trade or commerce parol evidence is admissible to prove the contents of a written agreement alleged to have been entered into in furtherance of such conspiracy, when the existence and execution of such agreement is first established and it is further shown that such agreement is in the possession or under the control of the defense and the state cannot secure or compel its production; and (3) to sustain a conviction on a charge of criminal conspiracy it must be shown that the party charged therewith knew of and participated in such conspiracy.

95.

STATE v. INTERNATIONAL HARVESTER CO.

(— Ark. —, 96 S. W. 119, 1906.)

The mere failure of an officer of a corporation to answer under oath the written inquiry made under section 7 of the Arkansas anti-trust law of 1905 does not constitue a separate offense upon which an action for penalties under said act can be based.

96.

STATE (ex rel. ENGLISH) v. LAZARUS et al.

(105 S. W. 780, Mo. App. 1907.)

The fact that one is a stockholder in a so-called combination or trust and is likewise interested in an independent corporation will not prevent him from enforcing his rights as stockholder in the independent company, although the two companies are competitors.

97.

STATE v. ST. PAUL GASLIGHT CO.

(92 Minn. 467, 100 N. W. 216, 1904.)

Where a *quasi* public corporation organized for a specific purpose, in the course of its business accumulates a by-product, a contract made by it with another for the exclusive sale of all of such commodity is not within the anti-trust laws.

98.

STERLING REMEDY CO. v. WYCKOFF, SEAMANS & BENEDICT.

(154 Ind. 437, 56 N. E. 911, 1900.)

The Indiana anti-trust law of 1897 has no retrospective effect.

99.

STRAIT v. NATIONAL HARROW CO.

(51 Fed. 819, U. S. C. C., N. Y. 1892.)

A combination in restraint of trade can be attacked only in a direct proceeding or in an action founded upon the combination agreement.

100.

STRAUS et al. v. AMERICAN PUBLISHERS' ASSOCIATION et al.

(92 N. Y. Supp. 153, 1904.)

The foregoing case holds that: (1) Where a trade agreement is lawful upon its face, but in the construction placed upon it by the parties to such an agreement an unlawful effect is given to it, the agreement is within section 1, chapter 690, Laws (1899) of New York; (2) whether an agreement is unlawful as creating a monopoly is not to be deter-

mined from its probable results, but from what may be done under it; and (3) where the subject-matter of the action involves only the question whether certain agreements and combinations are illegal and void as being in restraint of trade and the parties are within the jurisdiction of the court, the fact that the issues may require the court to construe the rights of the parties under the copyright law does not deprive it of jurisdiction over such controversy.

101.

TEXAS BREWING CO. v. ANDERSON et al.

(40 S. W. 737, Tex. Civ. App. 1897.)

In this case an alleged agency contract between the Brewing Company and Anderson was construed to be a contract of purchase and sale, the court holding that: (1) A contract between a wholesaler and dealer for the exclusive purchase and sale of a specific commodity within a definite place is contrary to anti-trust laws of 1889; and (2) not the form but the real nature of a contract will determine its validity under anti-trust laws.

102.

TEXAS BREWING CO. v. DURRUM et al.

(46 S. W. 880, Tex. Civ. App. 1898.)

The contract in this case was relied upon as an agency contract, and being similar to the contract involved in Texas Brewing Co. v. Anderson, it was condemned on the authority of that case.

103.

TEXAS BREWING CO. v. MEYER et al.

(38 S. W. 263, Tex. Civ. App. 1896.)

On the question of validity of contract involved this case follows Texas Brewing Co. v. Templeman.

104.

TEXAS BREWING CO. v. TEMPLEMAN et al.

(90 Tex. 277, 38 S. W. 27, 1896.)

In this case the construction of a contract between a wholesaler and dealer was involved. The construction placed upon such contract was that it constituted a purchase and sale, and not an agency contract. As the contract provided for the exclusive purchase and sale of a commodity within a definite place, it was held to be contrary to state anti-trust laws of 1889.

105.

THOMAS v. MILES' ADMINISTRATOR.

(3 Ohio St. 275, 1854.)

This case decides that: (1) A covenant not to compete with the vendor must be no more extensive than is necessary to afford a fair protection to the vendee; and (2) when the restraint specified in a restrictive covenant is larger than is necessary for the vendee's protection, such a covenant is divisible and may be upheld to the extent to which the covenant is valid.

106.

THOMSON et al. v. UNION CASTLE MAIL S. S. CO., LTD. et al.

(149 Fed. 933, U. S. C. C., N. Y. 1907.)

The damages recoverable under section 7, Sherman anti-trust act, must be such as approximately grow out of the illegal combination or contract.

107.

TODE et al. v. GROSS.

(127 N. Y. 480, 28 N. E. 469, 1891.)

Upon the sale of a business and good will and as a part of the same, a covenant by the vendor not to compete with

the vendee for a limited period, although unlimited as to territory, is not in general restraint of trade, and is valid.

108.

TRENTMAN et al. v. WAHRENBURG et al.

(30 Ind. App. 304, 65 N. E. 1057, 1903.)

This case decides that: (1) A covenant by the vendor upon the sale of the good will of a business not to compete with the vendee for a limited period within a specified territory is valid; (2) "the most certain test to determine whether or not the restraint upon the exercise of a business, trade or profession is reasonable is to consider whether the restraint is such as is necessary to afford protection to the interests of the party in whose favor it is given, and is not so large as to interfere with the interests of the public generally;" and (3) agreements of private persons and corporations for exclusive dealing between themselves, when confined to a certain locality and to continue for a limited time, are valid.

109.

TRIST v. CHILD.

(21 Wall. (88 U. S.) 441, 22 L. ed. 623, 1875.)

All contracts or agreements which are repugnant to justice, or are against the public policy of common law, or are contrary to the provisions of any statute, are void and unenforcible.

110.

TROY BUGGY WORKS CO. v. FIFE & MILLER.

(74 S. W. 956, Tex. Civ. App. 1903.)

A contract between a wholesaler or manufacturer and a dealer for the exclusive sale and purchase of a commodity during a specified period within a definite locality is contrary to the Texas anti-trust laws of 1899.

111.

TURNER v. ABBOTT.

(116 Tenn. 718, 94 S. W. 64, 6 L. R. A. (N. S.) 892, 1906.)

This case decides that: (1) An agreement by an employee, in consideration of his employment, not to engage in his employer's business or profession within a certain locality for a limited period is not in restraint of trade; and (2) a promise in consideration of employment on a salary not to carry on one's trade or profession in a particular place after the termination of such employment is valid.

112.

UNITED SHOE MACHINERY CO. v. KIMBALL et al.

(79 N. E. 790, Mass. 1907.)

An agreement on the part of the seller of a business and its good will not to engage in a similar business directly or indirectly for a period of fifteen years, although unrestricted as to place, where the business sold extends throughout the world, and when the agreement is not made for the purpose of obtaining a monopoly and has not a direct tendency to that result, is not against public policy.

113.

UNITED STATES CONSOLIDATED SEEDED RAISIN CO. v. GRIFFIN & SKELLEY CO.

(126 Fed. 364, U. S. C. C. A., Cal. 1903.)

A contract between a number of patentees of patents covering similar inventions under which the inventions are conveyed by the several owners to one of the parties, who is to grant licenses under all the patents to the others, is not void as against public policy, nor is it in violation of the Sherman anti-trust law, because of provisions intended to protect and keep up the patent monopoly by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed upon, impos-

ing conditions on each licensee as to the use and ownership of the patented article, and prohibiting him from using any others.

114.

UNITED STATES v. AMERICAN TOBACCO CO.

(146 Fed. 557, U. S. C. C., N. Y. 1906.)

This case holds that: (1) Although generally the secretary of a corporation by virtue of his office has the custody of all of its books and papers, it is within the power of a corporation to place some part of them in the special custody of some other officer; (2) a subpoena requiring the production of a corporation's minute books covering a period of about three years and copy letter books containing correspondence of about three to four months, is not invalid because too broad; (3) a subpoena directed to (naming him) secretary and treasurer is personal, and is not a subpoena on the corporation of which he is such officer; and (4) a subpoena *duces tecum* upon a person not actually in possession or control of the matter sought to be produced in evidence is of no effect.

115.

UNITED STATES v. DEBS et al.

(64 Fed. 724, U. S. C. C., Ill. 1894.)

The foregoing case holds that: (1) All conspiracies contrived with the intent, or of which the necessary or probable effect is to restrain, hinder, interrupt, or destroy interstate commerce, whether accomplished by contract or tort, are unlawful under section 1, Federal anti-trust law; and (2) the circuit courts of the United States have jurisdiction, under section 4 of the Federal anti-trust law, to restrain all violations of said statute, including such as may arise out of torts about to be committed in pursuance of a conspiracy in restraint of trade or commerce.

The foregoing case was affirmed by the supreme court of the United States in 158 U. S. 564, 39 L. ed. 1092.

116.

UNITED STATES v. ELLIOTT et al.

(64 Fed. 27, U. S. C. C., Mo. 1894.)

The circuit courts of the United States have jurisdiction under section 4 of the Federal anti-trust law to restrain all violations of said statute, including such as may arise out of torts about to be committed in pursuance of a conspiracy in restraint of trade or commerce.

117.

UNITED STATES v. GREENHUT.

(50 Fed. 469, U. S. D. C., Mass. 1892.)

An indictment under section 2, Act of July 2, 1890, should contain a distinct averment that by means of the acts charged the defendants have monopolized or have combined or conspired to monopolize trade and commerce among the several states or with foreign nations.

118.

UNITED STATES v. JELLICO MOUNTAIN COAL & COKE CO. et al.

(46 Fed. 432. 12 L. R. A. 753, 3 Interst. Com. Rep. 626, U. S. C. C., Tenn. 1891.)

A voluntary association of several mine operators on the one side and a majority of retail coal dealers on the other, formed for the purpose of fixing and regulating the price of coal within a designated locality, comes within the prohibition of the Federal anti-trust law.

This case was questioned as an authority in 43 L. ed. 306.

119.

UNITED STATES v. NELSON et al.

(52 Fed. 646, U. S. D. C., Minn. 1892.)

An indictment in the words of the Federal anti-trust law is insufficient.

120.

UNITED STATES v. WORKINGMEN'S AMALGAMATED COUNCIL OF NEW ORLEANS et al.

(54 Fed. 994, 26 L. R. A. 158, U. S. C. C., La. 1893.)

All combinations in restraint of interstate commerce, without reference to the character of the persons entering into them, are within the Sherman anti-trust law. Affirmed in 57 Fed. 85.

121.

VANDEWEGHE v. AMERICAN BREWING CO.

(61 S. W. 526, Tex. Civ. App. 1901.)

Contracts for the exclusive sale of a manufacturer's or producer's articles within a designated territory are not against Texas Revised Statutes 1895, article 5313.

122.

VICTOR TALKING MACHINE CO. et al. v. THE FAIR.

(61 C. C. A. 58, 123 Fed. 424, U. S., Ill. 1903.)

A patentee has an absolute right to fix and control the prices at which articles manufactured under his patent are to be sold to the public by jobbers and dealers.

123.

WALSH et al. v. DWIGHT et al.

(58 N. Y. Supp. 91, 1899.)

An agreement by a manufacturer of articles to give a rebate to a dealer in consideration of his refusal to sell such or similar articles at lower than fixed prices is not in restraint of trade.

124.

WATERHOUSE et al. v. COMER.

(55 Fed. 149, 19 L. R. A. 403, U. S. C. C., Ga. 1893.)

A rule of a voluntary association of locomotive engineers prohibiting its members from handling property of an interstate character belonging to a railroad against which such an association has a grievance or with which it has a difference, until the same is amicably settled, especially when such a grievance does not arise out of contract relations with such railroad, is in restraint of trade or commerce within the Federal anti-trust law.

125.

WELCH v. PHELPS & BIGELOW WIND MILL CO.

(89 Tex. 653, 36 S. W. 71, 1896.)

Contracts between agent and principal for the exclusive agency of a portion of the latter's business are not within the prohibition of the Texas 1889 anti-trust law.

126.

WESTERN UNION TELEGRAPH CO. v. AMERICAN UNION TELEGRAPH CO.

(65 Ga. 160, 38 Am. Rep. 781, 1880.)

A contract between a railroad company and a telegraph company, giving the latter the exclusive use of the former's right of way for telegraphic purposes, tends to prevent competition and create a monopoly and is void as against public policy.

127.

WHITE STAR LINE v. STAR LINE OF STEAMERS et al.

(141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551, 1905.)

This case holds that: (1) A contract or pooling arrangement between common carriers for the purpose of creating

a monopoly to control interstate traffic is unlawful and unenforcible under the Federal anti-trust laws; and (2) where a contract or arrangement is illegal under the Federal anti-trust law, such contract cannot be made the basis of an action in a state court.

128.

WISWALL (THE CHARLES E.) v. SCOTT et al.

(86 Fed. 671, 42 L. R. A. 85, U. S. C. C. A., N. Y. 1898.)

Where the contractual relation may be established without resorting to an illegal transaction or combination, the contract thus established is collateral to and unconnected with such combination and is enforcible.

129.

WOOD v. WHITEHEAD BROS. CO.

(165 N. Y. 545, 59 N. E. 357, 1901.)

This case decides that: (1) An agreement to discontinue one's business or occupation upon the sale of the good will to a competitor is not in restraint of trade in the sense of being illegal as against public policy, although such sale is not accompanied by the transfer of the plant and stock of the business; and (2) a contract in restraint of trade is void as against public policy only when its consequences or effect is injurious to public interests.

130.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. SEARLES.

(— Miss. —, 37 So. 939, 1905.)

A car service association which, although a railroad agency, is organized to insure prompt, accurate and impartial assessment of demurrage, and being recognized by and operated under state laws to secure uniform public benefits, is not such combination as is prohibited by Mississippi anti-trust laws.

EXCLUDED CASES.

EXCLUDED CASES.

1.

AMERICAN LIVE STOCK COMMISSION CO. v. CHICAGO LIVE STOCK EXCHANGE.

(143 Ill. 210, 1892.)

Questions of restraint of trade were involved in this case, but a decision upon them was not necessary to its disposition.

2.

ATLANTA TERMINAL CO. v. AMERICAN BAGGAGE & TRANSFER CO.

(125 Ga. 677, 54 S. E. 711, 1906.)

Discrimination against a private corporation by a common carrier was involved in this case. The complainant was not in a position to question the validity of the exclusive contract under the constitution, and this case no doubt furnished the reason for bringing subsequent proceedings. (See Hart Case, 58 S. E. 452.)

3.

BARBER ASPHALT PAV. CO. v. HUNT.

(100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. Rep. 530, 1890.)

In so far as this case approaches the subject of monopolies, it decides that a statute authorizing municipalities to receive bids includes bids in patent articles.

4.

BENNETT v. DUTTON.

(10 N. H. 481, 1839.)

This case involved discrimination by a common carrier against passengers coming from a certain direction.

5.

BLOCK et al. v. STANDARD DISTILLING & DISTRIBUTING CO.

(95 Fed. 978, U. S. C. C., Ohio. 1899.)

"Unfair competition" by imitating trade-name was involved in this case.

6.

BRADY v. MATTERN.

(100 N. W. 358, Ia. 1904.)

Legislative regulation of unincorporated building and loan associations different from that provided for incorporated building and loan companies was involved in this case; one of the contentions being that by making a distinction between incorporated and unincorporated companies the legislature, in effect, created a monopoly for the incorporated companies.

7.

CAMBLOS v. PHILADELPHIA & R. R. CO.

(4 Fed. Cas. 1089, No. 2,331, U. S. C. C., Pa. 1873.)

An express company, having obtained contract privileges from a railroad company, sought, through one of its stockholders, by injunction, to prevent the railroad company from competing with the express company in part of its business, to compel the allowance of certain disputed facilities and accommodations, and to prevent a continuance of alleged

privileges. A preliminary injunction was refused, because the acts sought to be restrained were already performed. The case on its merits involved a "monopoly" created by the state.

8.

CEBALLOS v. MUNSON S. S. LINE.

(93 App. Div. 593, 87 N. Y. Supp. 811, 1904.)

The real question involved in this case was the duration of the contract, and not its character.

9.

CENTRAL TRUST CO. v. OHIO CENTRAL R. CO.

(23 Fed. 306, U. S. C. C., Ohio, 1885.)

The United States circuit court of appeals, 8th circuit, (Missouri) said of this case that the opinion therein is unsupported by authorities and is unsound on principle. (61 Fed. 993, 999, 1894.)

10.

COMMONWEALTH v. WARD.

(92 Ky. 158, 1891.)

This case involved a conspiracy to defraud a municipal corporation by false deliveries of goods. No monopoly or restraint of trade question was in the case.

11.

DAVENPORT GAS & ELECTRIC CO. v. CITY OF DAVENPORT.

(98 N. W. 892, Ia. 1904.)

This case involved an exclusive franchise of a municipal corporation.

12.

DELAWARE, L. & W. R. CO. v. FRANK et al.

(110 Fed. 689, U. S. C. C., N. Y. 1901.)

This case was decided on a motion for a preliminary injunction. The fact that the complainant was an illegal combination did not satisfactorily appear, the case having been disposed of summarily. See opinion on rehearing.

13.

DETROIT v. MUTUAL GAS CO.

(43 Mich. 594, 5 N. W. (1039) 481, 1880.)

The power of a corporation to mortgage, and the construction of a gas ordinance prohibiting combination in rates were involved in this case.

14.

DICKERSON v. TINLING.

(28 C. C. A. 139, 34 Fed. 192, U. S., Colo. 1897.)

This case involved infringement of United States patent by sale of goods under foreign patent.

15.

DICKINSON v. CUNNINGHAM.

(140 Ala. 527, 37 So. 345, 1904.)

This case involved construction of a special act giving the exclusive privilege of supplying schools with books. The question of monopoly was raised, but the court held that there was no monoply intended or accomplished by the act.

16.

DR. MILES MEDICAL CO. v. GOLDTHWAITE.

(133 Fed. 794, U. S. C. C., Mass. 1904.)

This was a suit to restrain an interference with contracts; the proceeding was not contested.

17.

DR. MILES MEDICAL CO. v. PLATT.

(142 Fed. 606, U. S. C. C., Ill. 1906.)

This was a proceeding to enjoin interference with con tract rights. There was no "trust" issue in the case.

18.

DR. PETER H. FAHRNEY & SONS CO. v. RUMINER et al.

(39 Chi. Leg. N. 342, 153 Fed. 735, U. S. C. C. A., Ill. 1907.)

This case involved "unfair competition."

19.

DODGE STATIONERY CO. v. DODGE et al.

(145 Cal. 380, 78 Pac. 879, 1904.)

This case involved unfair competition. The point about restraint of trade is mere *obiter*.

20.

EDISON ELECTRIC LIGHT CO. v. SAWYER-MAN ELECTRIC CO.

(53 Fed. 592, U. S. C. C. A., N. Y. 1892.)

The question of monopoly outside of patent monopoly was not involved in this case.

21.

GENERAL ELECTRIC CO. v. WISE.

(119 Fed. 922, U. S. C. C., N. Y. 1903.)

This was an action for the infringement on a patent. The claim that the complainant was a party to an illegal combination was made but not proven. The question of violation of the Sherman anti-trust law was held to be foreign to the issues in the case.

22.

GOULD v. HEAD et al.

(38 Fed. 886, U. S. C. C., Colo. 1889.)

This case involved the construction of a power under a trust agreement to sell capital stock. The decision was against the power, but in 41 Fed. 240 the power to sell stock was held to exist under the trust agreement.

23.

GORRELL v. MAYOR, ETC., OF NEWPORT.

(1 Tenn. Ch. App. 120, 1901.)

This case involved the reasonableness of an ordinance restricting the operation of saloons within certain districts.

24.

GULF, COLORADO & SANTA FE RY. CO. v. MIAMI STEAMSHIP CO.

(30 C. C. A. 142, 86 Fed. 407, U. S., Tex. 1898.)

The only question properly before the court was whether a common carrier had a right to enter into an arrangement with another common carrier for through joint traffic.

25.

HARTZ v. EDDY.

(103 N. W. 852, Mich. 1905.)

This was an action on a lease, and the defense that the lease was part of a scheme to create a monopoly was not proven.

26.

HUTCHINS v. HUTCHINS.

(7 Hill. 104, N. Y. 1845.)

This case involved discussion of civil action for conspiracy to induce the revocation of a will.

27.

INGRAM v. NATIONAL SALT CO.

(130 Fed. 676, U. S. C. C. A., N. Y. 1904.)

In this case the evidence failed to show that the parties were *particeps criminis* in an otherwise perfectly legal transaction. The action was upon certain certificates of indebtedness which were claimed to have been illegally issued, but it was held otherwise.

28.

In re BELL.

(69 Kan. 855, 76 Pac. 1129, 1904.)

This was a *per curiam* opinion following State v. Jack, 76 Pac. 911.

29.

In re GRICE.

(79 Fed. 627, U. S. C. C., Tex. ,897.)

This case was reversed by the supreme court of the United States on the ground that under the particular facts no such

extraordinary showing was made as would warrant a Federal court's interference with the regular course of justice of a state court. See 169 U. S. 284, 42 L. ed. 748, Tex. 1898.

30.

In re OPINION OF THE JUSTICES.

(— Mass. —, 81 N. E. 142, 1907.)

This case involved proposed legislation to prevent a patentee from leasing or licensing the use of the machine embodying his invention. Two justices held proposed legislation to be constitutional; five justices held the opposite; all of the justices agreed that the Federal supreme court is the only tribunal to settle the question.

31.

JOHNSON PUBLISHING CO. v. MILLS.

(79 Miss. 543, 31 So. 101, 1902.)

In this case the anti-trust laws were held inapplicable to a contract between a state agency and a private corporation for the purchase of school books below cost.

32.

JOHNSTON v. SMITH'S ADM'R.

(70 Ala. 108, 1881.)

The contract involved in this case was claimed to be illegal for champerty and maintenance.

33.

KIDD v. PEARSON.

(128 U. S. 1, 32 L. ed. 346, 2 Interst. Com. Rep. 232, Ia. 1888.)

This case involved the constitutionality of a law passed under state police power authorizing abatement of nuisance by reason of manufacture of liquors.

34.

LOEWE et al. v. LAWLOR et al.

(148 Fed. 924, U. S. C. C., Conn. 1906.)

In this case the demurrer to the complaint was sustained to enable the supreme court to pass upon certain propositions.

35.

MICHAEL v. PRUSSIAN NATIONAL INSURANCE CO.

(171 N. Y. 25, 63 N. E. 810, 1902.)

The principal question involved in this case was whether the owner of an elevator had so changed the title to his elevator by an arrangement with a certain elevator association as to avoid insurance on his plant. The legality of the association was not before the court. In passing upon the question the court held that under the terms of the policy and the circumstances there was neither fraud nor change in the subject-matter of the insurance. See Kellogg v. Sowerby, 83 N. E. 47.

36.

MINNESOTA v. NORTHERN SECURITIES CO.

(184 U. S. 199, 46 L. ed. 499, Minn. 1902.)

This case was dismissed for want of indispensable parties —the necessary parties being the Great Northern Railway Company and the Northern Pacific Railway Company.

37.

MONTGOMERY WARD & CO. v. SOUTH DAKOTA RETAIL MERCHANTS' & HARDWARE DEALERS' ASSN. et al.

(150 Fed. 413, U. S. C. C. So. Dak. 1907.)

This case involved unfair competition and what it does not constitute.

38.

MORRIS' RUN COAL CO. v. BARCLAY COAL CO.

(68 Pa. St. 173, 8 Am. Rep. 159, 1871.)

This case was reviewed and overruled in 59 Atl. 1092½.

39.

NEW YORK, N. H. & H. R. CO. v. OFFIELD.

(77 Conn. 417, 59 Atl. 510, 1904.)

This case involved legislative power over railroad consolidation.

40.

NORTHWESTERN WAREHOUSE CO. v. OREGON R. & NAV. CO.

(32 Wash. 218, 73 Pac. 388, 1903.)

This was a mandamus proceeding to compel the railroad to give same facilities to shippers as others enjoyed. The proof failed to show existence of monopoly in the warehouse business at a certain point.

41.

OLSEN v. SMITH.

(25 Sup. Ct. Rep. 52, 195 U. S. 332, 49 L. ed. 224, Tex. 1904.)

This case involved the power of a state to regulate pilotage in the absence of congressional regulation on the subject, and the discriminating character of such a law. The question of monopoly was incidentally and not necessarily involved in the case.

42.

ORR v. HOME MUTUAL INS. CO.

(12 La. Ann. 255, 68 Am. Dec. 770, 1857.)

This was an action for damages claimed to have been caused by the conspiracy of three insurance companies not to employ plaintiff, whose contractual rights with other insurance companies were not interfered with. The plaintiff's sole reliance was upon the three defendants' refusal to employ him, and it was held that he had no action against them.

43.

PACKARD et al. v. BYRD.

(73 S. C. 1, 51 S. E. 678, 6 L. R. A. (N. S.) 547, 1905.)

This was an action for recovery of the price of goods; it turned on the plaintiff's ability to establish his case without relying upon illegality, and the giving of an erroneous instruction.

44.

PENNSYLVANIA R. CO. v. HUGHES.

(191 U. S. 477, 48 L. ed. 268, Pa. 1903.)

This case has no reference to monopolies.

45.

PEOPLE v. BRICKNER et al.

(15 N. Y. Supp. 528, 1891.)

This case turned on the insufficiency of evidence before the grand jury to connect and charge defendants with a general conspiracy.

46.

PEOPLE (ex rel. BURNHAM) v. FLYNN.

(— N. Y. —, 82 N. E. 169, 1907.)

Under the facts in this case the person who attempted to invoke the aid of subdivision 5, section 168, Penal Code, was not exercising a lawful trade or calling, and said provision was therefore held inapplicable.

47.

PEOPLE v. PEOPLE'S GAS LIGHT AND COKE CO.

(205 Ill. 482, 68 N. E. 950, 1903.)

This case involved the constitutionality of a legislative act authorizing the merger and consolidation of gas companies generally. A monopoly was neither alleged nor proved.

48.

RAFFERTY v. BUFFALO CITY GAS CO.

(56 N. Y. Supp. 288, 1899.)

This case involved the right of a corporation to purchase the capital stock of another company under section 42 of the Stock Corporation Law.

49.

RAYMOND v. LEAVITT.

(46 Mich. 447, 1881.)

This was an action to recover for money advanced to corner the market in wheat.

50.

SAYRE v. LOUISVILLE UNION BENEVOLENT ASSN.

(1 Duv. 143, 85 Am. Dec. 613, Ky. 1863.)

This case turned upon the validity of a by-law providing for freight rates to be charged by members of an unincorporated association of carriers which fixed the rate regardless of its reasonableness or unreasonableness; and it was held that neither under the charter nor upon general principles could such a by-law be sustained.

51.

SMITH et al. v. PEOPLE.

(25 Ill. 9, 1860.)

This case involved a conspiracy to seduce a female.

52.

STATE v. HARTFORD & N. H. R. CO.

(29 Conn. 538, 1861.)

This case involved the principle that a public corporation cannot by contract avoid its corporate duties.

53.

STATE (ex rel. DURNER) v. HUEGIN.

(110 Wis. 189, 85 N. W. 1046, 1901.)

This was an action for conspiracy to maliciously injure a tradesman, based upon a special statute against boycotts, and turned upon the existence of actual malice and injury and not as a result of competition.

54.

STATE v. JACOBS.

(7 Ohio N. P. 261, Ohio Police Ct. Clev. 1900.)

This was a case of a strike and boycott. It is doubtful whether the 1898 anti-trust law was correctly applied to the facts of the case.

55.

STATE v. NEW ORLEANS WAREHOUSE CO. et al.

(109 La. Ann. 63, 33 So. 81, 1902.)

The question of monopoly was remotely involved in this case.

56.

STATE (ex inf. ATTORNEY-GENERAL) v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

(182 Mo. 284, 81 S. W. 395, 1904.)

The majority opinion in this case concurred in by three justices is unsatisfactory. The dissenting opinion rests upon a better understanding of the facts, the pleadings, and the law. This case is of little value as an authority.

57.

STEWART v. ERIE & WESTERN TRANSPORTATION CO. et al.

(17 Minn. 372 (Gil. 348), 1871.)

This case involved a traffic arrangement between connecting carriers. The arrangement was considered as not having the effect of creating or tending to create a monopoly.

58.

TIFT et al. v. SOUTHERN RY. CO. et al.

(138 Fed. 853, U. S. C. C., Ga. 1905.)

This case involved railway rate discrimination. The anti-trust issue raised in this case was subsequently abandoned. Affirmed in 148 Fed. 1021, 1906.

59.

UNITED STATES v. CASSIDY et al.

(67 Fed. 698, U. S. D. C., Cal. 1895.)

This case involved a conspiracy under Revised Statutes, section 5440, United States, relating to obstruction of commerce.

60.

VERDIN et al. v. ST. LOUIS et al.

(131 Mo. 26, 33 S. W. 480, 36 S. W. 52, 1895.)

This case involved the validity of an ordinance. The question of monopoly was raised by virtue of a patent.

61.

VIERS v. DETROIT PAPER-PACKAGE CO. et al.

(119 Mich. 192, 77 N. W. 700, 1899.)

This was a creditor's proceeding and has nothing in it of a monopoly nature.

62.

VULCAN DETINNING CO. v. AMERICAN CAN CO. et al.

(67 Atl. 339, N. J. 1907.)

This case involved unfair competition.

63.

WARE et al. v. CURRY.

(67 Ala. 274, 1880.)

This case involved enforcement of illegal contracts generally; it does not involve contracts in restraint of trade or contracts concerning monopolies.

64.

WARREN v. BARBER ASPHALT PAV. CO.

(115 Mo. 572, 22 S. W. 490, 1893.)

This case involved the construction of a city ordinance. The right of a city to avail itself of a patent invention instead of permitting competition as required by city charter was not passed upon.

65.

WARTH v. LOEWENSTEIN & SONS

(121 Ill. App. 71, 1905.)

All that was said in this case as to restraint of trade is *obiter*.

66.

WELD v. LANCASTER.

(56 Me. 453, 1868.)

The contract involved in this case was one to save harmless a government contractor, in consideration of his withdrawal or repudiation of his obligation or bid to the government. The principle or rule under which this case is cited in 86 S. W. 220 was not involved.

67.

WELLS & RICHARSON CO. v. ABRAHAM et al.

(146 Fed. 190, U. S. C. C., N. Y. 1906.)

This case involved unfair competition by inducing a breach of contract.

68.

WHITE v. HUNTER.

(23 N. H. 129, 1851.)

Neither parties nor privies to contracts based upon an immoral consideration can enforce them is the principle involved in this case.

69.

WHITAKER v. KILBY et al.

(106 N. Y. Supp. 511, 1907.)

The reasoning of the opinion in this case, that the telephone business is not impressed with a public use when the companies exercising such business have no power of eminent domain, and that therefore such business may be restrained to a reasonable degree, is unsound and erroneous.

70.

WILLOUGHBY v. CHICAGO JUNCTION RAILWAYS & UNION STOCK YARDS CO.

(50 N. J. Eq. 656, 25 Atl. 277, 1892.)

This case is similar to the Ellerman Case, 23 Atl. 287, and turned upon *res judicata* of that case. After an exhaustive review of the facts, the court concluded that it failed to see how the particular agreement came within the Sherman act.

71.

WITHAM v. COHEN et al.

(100 Ga. 670, 28 S. E. 505, 1897.)

This case involved a suit for damages caused by a conspiracy to swindle and defraud stockholders in a corporation.

REFERENCE TABLE

OF

UNITED STATES AND STATES ANTI-TRUST CONSTITUTIONAL PROVISIONS AND LAWS.

REFERENCE TABLE.

ALABAMA.

1890–1891 Laws, chapter 202, page 438 (1896 Criminal Code, section 5557).

1902 Constitution, article 4, section 74.

ALASKA.

No general statutory provisions. See United States.

ARIZONA.

No general statutory provisions. See United States; also, Arizona Penal Code, section 504, against corporate stock and bond ownership.

ARKANSAS.

1874 Constitution, article 17, section 4, against railroad consolidation.

1897 Laws, page 60.

1899 Laws, page 50; repealed, see *Hartford Fire Ins. Co. v. State*, page 263 *ante*.

1905 Laws, page 1 (King Bill).

CALIFORNIA.

1880 Constitution, article 12, sections 20, 21, against railroads.

1893 Laws, chapter 30, against live stock.

Sections 1673, 1674 and 1675, Civil Code, against restraint of trade.

1907 Laws, chapter 530, page 984.

COLORADO.

1876 Constitution, article 15, sections 5 and 13 against railroad and telegraph consolidation.

CONNECTICUT.

No general statutory provisions.

DELAWARE.

No general statutory provisions.

DISTRICT OF COLUMBIA.

See United States.

FLORIDA.

1897 Laws, page 60, against cattle and their products.
1897 Acts (1906 General Statutes, sections 3160–3164).

GEORGIA.

1877 Constitution, article 1, section 3, paragraph 2, and article 4, section 2, paragraph 4 (1895 Civil Code, sections 5730 and 5800).

—— Acts —— (1895 Civil Code, section 3668 (2750) against general restraints.

1890–1 Acts, page 206 (1895 Civil Code, sections 2085–2088) against insurance pools.

1892 Acts, page 49 (1895 Civil Code, sections 2173, 2179) against railroad consolidation.

1896 Acts, page 68 (1901 Supplement to Civil Code, sections 6467–6471); unconstitutional, see *Brown v. Jacobs Pharmacy Co.*, page 73 *ante*.

HAWAII.

1905 Revised Laws, page 46, section 5; also sections 2541, 3091, 3100.

IDAHO.

1889 Constitution, article 11, section 18.

ILLINOIS.

1870 Constitution, article 4, section 22, against exclusive privileges; and article 11, section 11, against railroad consolidation.

1891 Laws, page 206 (1 Starr & Curtis' Annotated Statutes, second edition, page 1252).

1893 Laws, page 89, constitutional; page 182 unconstitutional (1 Starr & Curtis' Annotated Statutes, second edition, pages 1255–7).

1897 Laws, page 298 (1903 Hurd's Revised Statutes, page 665).

1907 Laws, page 216, amending section 7a, Act 1891.

INDIANA.

1897 Laws, page 159 (1901 Burns' Annotated Statutes, sections 3312g–3312l).

1899 Laws, page 257 (1901 Burns' Annotated Statutes, sections 3312m–3312q).

1901 Laws, page 178 (1901 Burns' Annotated Statutes, sections 3312r, 3312u).

1907 Laws, page 490, chapter 243 (effective at noon April 10, 1907, by Governor's proclamation).

IOWA.

1890 Laws, chapter 28 (1897 Code, page 1968, section 5060, *et seq.*, "Pools and Trusts").

1897 Code, sections 1754, 1755, 1756 and 1757, concerning insurance.

1906 Laws, page 119, chapter 169, against discrimination in petroleum.

1907 Acts, page 185, chapter 187, amending section 5062.

1907 Acts, page 185, chapter 188, against grain combinations.

KANSAS.

1887 Laws, page 261, chapter 175 (1905 General Statutes, section 4440, *et seq*).

1889 Laws, page 389, chapter 257 (1901 General Statutes, sections 2427–2431, 2438).

1891 Laws, page 294, chapter 158 (1901 General Statutes, sections 2439–2441).

1897 Laws, page 481, chapter 265 (1901 General Statutes, sections 7864–7874); repeals Act of 1891 by implication, see *State v. Wilson*, page 577 *ante*.

1899 Laws, page 492 (1899 General Statutes, chapter 113a).

1905 Laws, chapter 2, (against trade discrimination) and chapter 157 (against individual monopoly).

1907 Laws, chapter 139, against exclusive contracts.

1907 Laws, chapter 259, evidence and immunity.

KENTUCKY.

1858 Laws, page 10, chapter 113.

1889–1890 Laws, page 143, chapter 1621. Act May 20, 1890 (1903 Statutes, page 1391).

1891 Constitution, section 201, against *quasi* public corporations; Constitution, section 198.

1906 Laws, page 429, chapter 117; constitutional, see *Owen County Burley Tobacco Society v. Brumback*, page 442 *ante*.

LOUISIANA.

1898 Constitution, article 190.

French Penal Code, article 419.

1890 Laws, page 90 (2 Wolff's Constitution and Revised Laws, page 1806).

1892 Laws, page 120 (2 Wolff's Constitution and Revised Laws, page 1804).

MAINE.

1889 Laws, chapter 266 (1903 Revised Statntes, page 443, chapter 47, section 53, *et seq*).

MARYLAND.

1864 Constitution, Declaration of Rights, section 41.

MASSACHUSETTS.

None against monopolies; as to restraint of trade, see 1902 Revised Laws, chapter 56, section 1.

1901 Laws, page 411, chapter 478.

MICHIGAN.

1850 Constitution, article 19a, section 2, against railroad consolidation.

1887 Laws, page 384, Act 285, against foreign insurance.

1889 Laws, page 331, chapter 255 (3 Howell's Annotated Statutes, sections 9354j-9354p; 1897 Compiled Laws, section 11,377 *et seq*).

1899 Laws, page 409.

1905 Laws, page 331, Act 229.

1905 Laws, page 507, cumulative.

1907 Laws, page 243, Act 181, against insurance discrimination.

MINNESOTA.

1874 Laws, page 154, chapter 29, against railroads.

1881 Laws, page 109, chapter 94, against railroads.

1891 Laws, page 82, chapter 10 (1894 Minnesota Statutes, sections 6955, 6956, 6962).

1899 Laws, chapter 359.

1901 Laws, chapter 194 (1905 Revised Laws, sections 2098, 5168, 5169).

1907 Laws, chapter 269.

MISSISSIPPI.

1890 Laws, chapter 36 (1892 Annotated Code, chapter 140, page 971).

1896 Laws, page 99, amending section 4440.

1898 Laws, page 89.

1900 Laws, page 125, chapter 88.

1902 Laws, page 100 (1906 Mississippi Code, section 5002, *et seq.*)

MISSOURI.

1875 Constitution, article 12, section 17, against railroad consolidation.

1887 Laws, page 102 (1899 Revised Statutes, section 1062, against railroad consolidation.

—— Laws, —— (1906 Missouri Annotated Statutes, section 1135, against pooling by railroads.

1889 Laws, page 96; repealed—see *State v. Standard Oil Co. of Indiana*, page 571 *ante*.

1891 Laws, page 186 (1899 Revised Statutes, section 8965, *et seq.*)

1895 Laws, page 237 (1899 Revised Statutes, section 8965, *et seq.*)

1897 Laws, page 208 (1899 Revised Statutes, section 8965, *et seq.*)

1899 Laws, page 318 (1899 Revised Statutes, sections 8983, 8985).

1899 Revised Statutes, sections 8986–8992, concerning testimony.

1907 Laws, pages 234, 374, 377, 382, 383.

MONTANA.

1889 Constitution, article 15, sections 6, 20.

1895 Penal Code (IV), section 320, *et seq.* Sections 321, 325 Penal Code, unconstitutional, see *State v. Cudahy Packing Co.*, page 536 *ante*.

NEBRASKA.

1875 Constitution, article 11, section 3, against railroad and telegraph consolidation.

1887 Laws, page 675, chapter 114, against grain dealers.

1889 Laws, page 516, chapter 69 (1895 Compiled Statutes, chapter 91a).

1893 Laws, page 398, chapter 49, against lumber and coal dealers.

1897 Laws, page 347, *et seq.*, chapters 79, 80, 81 (1901 Compiled Statutes, chapter 91a), repeals 1889 Act. See *State v. Omaha Elevator Co.*, page 554 *ante*. Chapter 81 unconstitutional, see *Niagara Fire Ins. Co. v. Cornell*, page 429 *ante*.

1905 Laws, page 636, chapter 162, repeals 1897 Act, chapter 79 by implication, except section 1, see *State v. Omaha Elevator Co.*

1907 Laws, chapters 157 and 162 against discrimination.

NEVADA.

No general statutory provisions.

NEW HAMPSHIRE.

1867 Laws, chapter 8, against railroad monopolies.

NEW JERSEY.

No general statutory provisions.

NEW MEXICO

1891 Laws, chapter 10, page 27 (1897 Compiled Laws, sections 1292–1294).

1907 Laws, chapter 18.

NEW YORK.

1841 Laws, chapter 183, section 16, against salt manufacturers.

1854 Laws, chapter 232, section 22, against navigation companies.

1881 Penal Code, section 168, subsections 5 and 6.

1893 Laws, page 1782, chapter 716, repealed.

1896 Laws, page 212, chapter 267, repealed.

1897 Laws, pages 310 and 313, chapters 383, 384 (3 Birdseye's Revised Statutes, third edition, page 3410, paragraph 7) repealed by 1899 Act.

1899 Laws, page 1514, chapter 690 (2 Birdseye's Revised Statutes, third edition, page 2405—Donnelly anti-trust act).

NORTH CAROLINA.

1868 Constitution, article 1, sections 7, 31.

1889 Laws, page 372, chapter 374.

1899 Laws, page 852, chapter 666.

1901 Laws, page 820, chapter 586 (1905 Revisal, section 3739).

1907 Laws, chapters 218, 219.

NORTH DAKOTA.

1889 Constitution, article 7, sections 141, 146.

1905 Laws, page 171.

1907 Laws, pages 84, 85, 297.

OHIO.

1885 Laws, page 231, No. 284 against insurance.

1891 Laws, page 485, No. 508 against insurance.

1898 Laws, page 143, No. 336 (2 Bates' Annotated Statutes, 1908 Edition, page 2473, *et seq.*, sections 4427–1, 4427–12). Section 4427–6 unconstitutional, see *Hammond v. State*, 84 N. E. 416, 1908.

1900 Laws, page 165, No. 603, against insurance.

1906 Laws, page 229, No. 311.

1906 Laws, page 313, No. 380, adding section 6a to Act of 1898.

OKLAHOMA

1890 Act Dec. 25 (1893 Statutes, paragraph 6139 *et seq.*, and 1903 Wilson's Revised Annotated Statutes, page 1501, section 813, *et seq*).

1907 Constitution, article 9, sections 38, 41, 45.

OREGON.

1902, Bell & Cott Annotated Codes & Statutes, section 5127, against railroads.

PENNSYLVANIA.

1873 Constitution, article 16, section 12, against telegraph consolidation; article 17, section 4, against railroad consolidation.

No general statutory provisions.

PHILIPPINE ISLANDS.

No general statutory provisions.

PORTO RICO.

No general statutory provisions.

RHODE ISLAND.

No general statutory provisions.

SOUTH CAROLINA.

1895 Constitution, article 9, section 13.

1897 Act (22 Statutes at Large, page 438).

1898 Amended Act (22 Statutes at Large, page 782 (1902 Civil Code, sections 2845–2847 and Criminal Code sections 212–216).

1902 Acts, page 1057, No. 574 (Civil Code, article 7, chapter 34, sections 1607a–1607g).

SOUTH DAKOTA.

1890 Laws, chapter 154 (1903 Revised Code, section 776, *et seq.*)

1893 Laws, chapter 171 (1903 Revised Code, section 780).

1897 Laws, chapter 94 (1903 Revised Code, page 1185, section 770, *et seq.*)

1907 Laws, page 196, chapter 132, unfair competition.

TENNESSEE.

1871 Constitution, article 1, section 22.

1889 Laws, chapter 250.

1891 Laws, chapter 218 (1896 Shannon's Annotated Code, section 3185, *et seq.*).

1896 Shannon's Annotated Code, section 6693, *et seq.* against conspiracies.

1897 Laws, chapter 93 (1897–1903 Shannon's Supplement to Annotated Code, page 518, against coal conspiracies.

1897 Laws, page 241, chapter 94; constitutional, *State v. Schlitz Brewing Co.*, page 559 *ante*.

1903 Laws, page 268, chapter 140 (1903 Shannon's Supplement to Code, page 518).

1905 Laws, chapter 479.

1907 Laws, chapters 36, 155, 360.

TEXAS.

1876 Constitution, article 10, section 5, against railroad consolidation; and article 1, section 26, against perpetuities and monopolies.

1889 Laws, page 141, chapter 117 (1897 Sayles' Civil Statutes, article 5313, *et seq.*) in force until March 31, 1903.

—— Penal Code, sections 976, *et seq.* repealed by Act 1903.

1895 Laws, page 112, chapter 83, repealed by Act 1903.

1899 Laws, page 246, chapter 146, repealed by Act 1903, see *Waters-Pierce Oil Co. v. State*, page 643 *ante*.

1903 Laws, page 119, chapter 94 (Sayles' Civil Statutes, Supplement 1897–04, page 556, article 5313) in effect March 31, 1903.

1907 Laws, page 16.

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1907 Laws, page 194.

1907 Laws, page 322.

1907 Laws, page 456.

UTAH.

1895 Constitution, article 12, sections 13, 20.
1896 Law, page 125 (1898 Revised Statutes, page 423, title 54, section 1752, *et seq.*)

VERMONT.

No general statutory provisions.

VIRGINIA.

1902 Constitution, article 12, section 165.

WASHINGTON.

1889 Constitution, article 12, sections 16, 22 (2 Ballinger's Annotated Code & Statutes, pages 2116–2117.
1907 Laws, page 99, immunity.

WEST VIRGINIA.

1872 Constitution, article 11, section 11, against railroad consolidation.

WISCONSIN.

1897 Laws, page 908, *et seq.*, chapters 356–357 (1898 Wisconsin Statutes, sections 1747e *et seq.*, 1791j *et seq.*, and 1943b).
1905 Law, pages 937, 944, chapters 506, 507.
1907 Laws, page 432, chapter 562.

WYOMING.

1889 Constitution, article 1, section 30.

UNITED STATES.

1890 Act July 2 (26 Statutes at Large 209, 1901 United States Compiled Statutes 3200).

1894 Act August 27, chapter 349, sections 73–77 (28 Statutes at Large 570, 1901 United States Compiled Statutes, pages 3202, 3203).

1903 Act February 25 (32 Statutes at Large 904, 1901 United States Compiled Statutes, 1905 Supplement, 602).

1906 Act June 30 (34 Statutes at Large 798, chapter 3920, Federal Statutes Annotated, Supplement 1907, 382).

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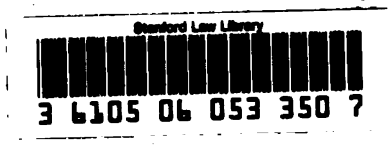

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